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# Federal Register

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# Rules and Regulations

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 892

**[Docket No. FDA–2005–N–0346] (formerly 2005N–0467)**

### Medical Devices; Radiology Devices; Reclassification of Bone Sonometers

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of July 17, 2008 (73 FR 40967). The final rule reclassified bone sonometer devices from class III into class II, subject to special controls. The document contained an inadvertent error regarding the impact of the final rule on small businesses. This document corrects that error.

**FOR FURTHER INFORMATION CONTACT:** Domini Cassis, Center for Devices and Radiological Health (HFZ–215), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 240–276–2342.

**SUPPLEMENTARY INFORMATION:** In FR Doc. E8–16354, appearing on page 40969 in the **Federal Register** of Thursday, July 17, 2008, there was an error regarding the impact of the final rule on small businesses. Specifically, language certifying that the final rule meets the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612) was inadvertently omitted during document preparation. Accordingly, the following correction is made:

1. On page 40969, in the middle column, under section ''VI. Analysis of Impacts,'' in the second full paragraph, the third sentence is revised to read: ''The agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.''

Dated: August 8, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–18792 Filed 8–13–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF STATE

### 22 CFR Part 121

**[Public Notice 6316]**

**RIN 1400–AC47**

### Amendment to the International Traffic in Arms Regulations: The United States Munitions List Category VIII

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** The Department of State is amending the text of the International Traffic in Arms Regulations (ITAR), Part 121 to add language clarifying how the criteria of Section 17(c) of the Export Administration Act of 1979 (''EAA'') are implemented in accordance with the Department of State's obligations under the Arms Export Control Act (''AECA''), and restating the Department's longstanding policy and practice of implementing the criteria of this provision.

**DATES:** *Effective Date:* This rule is effective August 14, 2008.

**FOR FURTHER INFORMATION CONTACT:** Director Ann Ganzer, Office Defense Trade Controls Policy, Department of State, Telephone (202) 663–2792 or Fax (202) 261–8199; e-mail *DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, ITAR Part 121.

**SUPPLEMENTARY INFORMATION:** On April 11, 2008, the Department published a Notice of Proposed Rulemaking (NPRM) to add language clarifying how the criteria of Section 17(c) of the Export Administration Act of 1979 are implemented in accordance with the Arms Export Control Act by amending Category VIII *(b), (h), and the Note. Further background is provided with the NPRM at 73 FR 19778.

This rule reinstates the Section 17(c) reference in the ITAR to assist exporters in understanding the scope and application of the Section 17(c) criteria to parts and components for civil aircraft. It also clarifies that any part or component that (a) is standard equipment; (b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for civil, non-military aircraft (this expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft, defined by FAA Order 8110.101 effective date September 7, 2007 as ''civil aircraft procured or acquired by the military''); and (c) is an integral part of such civil aircraft, is subject to the jurisdiction of the Export Administrative Regulations (EAR). Where such part or component is not Significant Military Equipment (''SME''), no Commodity Jurisdiction (CJ) determination is required to determine whether the item meets these criteria for exclusion under the United States Munitions List (USML), unless doubt exists as to whether these criteria have been met. However, where the part or component is SME, a CJ determination is always required, except where a SME part or component was integral to civil aircraft prior to the effective date of this rule.

Additionally, this proposed rule adds language in a new Note after Category VIII(h) to provide guidelines concerning the parts or components meeting these criteria. The change to Category VIII*(b) also identifies and designates certain sensitive military items, heretofore controlled under Category VIII(h), as SME. Previous and current authorizations concerning the manufacturer of these items will not require notification in accordance with § 124.11, and will not require a ''Nontransfer and Use Certificate'' DSP–83, unless they are amended, modified, or renewed.

This requirement for a CJ determination by the Department of State helps ensure the U.S. Government is made aware of, and can reach an informed decision regarding, any sensitive military item proposed for standardization in the commercial aircraft industry before the item or technology is actually applied to a commercial aircraft program, whether such item is integral to the aircraft, and, if so, whether the development, production, and use of the technology

associated with the item should nevertheless be controlled on the USML. It will also ensure the Department of State fulfills the requirements of section 38(f) of the Arms Export Control Act.

This regulation is intended to clarify the control of aircraft parts and components, and does not remove any items from the USML, nor does it change any CJ determinations. Should there be an apparent conflict between this regulation and a CJ determination issued prior to this date, the holder of the determination should seek reconsideration, citing this **Federal Register** Notice and 22 CFR 121.1(c) Category VIII Note of this subchapter.

The Proposed Rule had a comment period ending May 12, 2008. Twenty (20) parties filed comments by May 12th recommending changes. Having thoroughly reviewed and evaluated the comments and the recommended changes, the Department has determined that it will, and hereby does, adopt the Proposed Rule, with minor edits, and promulgates it as a Final Rule. The Department's evaluation of the written comments and recommendations follows.

**Comment Analysis**

Ten (10) commenting parties criticized the Department for making ''specifically designed military hot section components and digital engine controls (*e.g.*, Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC))'' significant military equipment in paragraph *(b) of Category VIII. The Department believes that the designation of these military hot section components and digital engine controls as significant military equipment is necessary to safeguard the national security of the United States, because these components and controls fulfill the definition of significant military equipment in 22 CFR 120.7 in that they have the ''capacity for substantial military utility or capability.'' In addition, the significant military equipment designation of these components and controls is consistent with the exclusion of hot section technology from 22 CFR 124.2(c) and 126.5. The Department will not, as a matter of process, require DSP–83 nontransfer and use certificates for the export of spare parts for hot sections and digital engine controls previously authorized for export. The ''grand-father clause'' added to sub-paragraph (b) for military hot section components and digital engine controls manufactured to engineering drawings dated on or before January 1, 1970 was also intended to address the concerns raised by the ten commenting parties.

Six (6) commenting parties recommended paragraph (h) of Category VIII(h) start with the phrase ''Except as noted below.'' That phrase does not conform with the regulatory language used in other sub-paragraphs of the United States Munitions List categories that have associated notes paragraphs.

One (1) commenting party recommended the commodity jurisdiction requirement for significant military equipment be removed from the explanatory note. The inclusion of the commodity jurisdiction requirement for significant military equipment is needed to ensure the government has an opportunity to review proposals to use military equipment in a civil application and to avoid the removal of items from the United States Munitions List through company self-determinations. Before placing a defense article considered significant military equipment on a civil aircraft, a written commodity jurisdiction determination must be obtained.

Seven (7) commenting parties recommended the first sentence of the explanatory note add the EAR term ''or item.'' The Department has chosen to use ITAR terms.

One (1) commenting party recommended the first sentence of the explanatory note use the phrase ''component, part, accessory, and associated equipment'' instead of ''part or component.'' That recommendation was adopted.

Eleven (11) commenting parties recommended the first sentence of the explanatory note delete ''exclusively.'' The suggestion was not adopted. The word is necessary, since the Department claims no jurisdiction over parts or components designed exclusively for civil, non-military aircraft. Such parts and components are subject to Department of Commerce jurisdiction.

Four (4) commenting parties recommended the ''and'' linking ''civil, non-military aircraft'' and ''civil, non-military aircraft engines'' in the first sentence of the explanatory note be changed to an ''or.'' There was a concern about coverage of a part or component of a civil, non-military aircraft engine. The sentence in the final rule was changed to clarify that a part or component designed exclusively for civil, non-military aircraft and a part or component designed exclusively for a civil, non-military aircraft engine are both controlled by the Department of Commerce.

Two (2) commenting parties recommended part (b) of the second sentence of the explanatory note add Parts Manufacturer Approval (PMA). As a PMA may be issued for an exclusively USML item, inclusion of PMA is not appropriate here.

Six (6) commenting parties recommended part (b) of the second sentence of the explanatory note be expanded to include foreign government civil aviation authorities. As Section 17(c) is limited to certifications issued by the Federal Aviation Administration, it is appropriate to limit the civil aircraft type certificate (including amended type certificates and supplemental type certificates) to those issued by the U.S. Federal Aviation Administration.

Six (6) commenting parties recommended part (b) of the second sentence of the explanatory note add ''FAA Order 8110.10'' after ''Military Commercial Derivative Aircraft.'' That reference has been included in the supplementary information above.

Six (6) commenting parties recommended part (c) of the second sentence of the explanatory note change ''control of the EAR'' to ''jurisdiction of the EAR.'' This change was adopted.

One (1) commenting party recommended explaining the Department of State's policy concerning its jurisdiction over an ITAR-controlled article that is incorporated into a civil item. With few exceptions specified in the ITAR (e.g. USML Category XIV(n)(4)(i)), a USML item does not change jurisdiction when it is incorporated into another item. As stated above, it is important for the government to review, via the Commodity Jurisdiction process, the proposed use of military items in commercial applications.

One (1) commenting party recommended the fourth sentence of the explanatory note change ''part or component'' to ''components, parts, accessories, attachments, and associated equipment.'' This change was not adopted. An ''accessory,'' an ''attachment,'' and ''associated equipment'' are not considered standard equipment integral to the civil aircraft.

Four (4) commenting parties recommended the fourth sentence of the explanatory note change ''a part'' to ''such a part'' and delete ''designated as SME in this category.'' The purpose of this sentence is to grandfather from obtaining a commodity jurisdiction determination a part or component designated as Significant Military Equipment (SME) in Category VIII that was standard equipment, integral to civil aircraft prior to the effective date of the final rule. The language of the proposed rule is clearer and has been retained.

Ten (10) commenting parties recommended the eighth sentence of the explanatory note add at the end of the sentence ''of the item's form, fit, or function.'' This change was adopted.

Four (4) commenting parties recommended the ninth sentence of the explanatory note delete ''radomes'' and ''low observable blades'' and add ''rotodomes'' and ''bomb bay doors.'' The Department accepted the substitution of rotodomes for radomes.

Fifteen (15) commenting parties recommended the tenth sentence of the explanatory note add ''manufacturer's specification or standard'' and add Technical Standard Order ''TSO'' in the parenthesis. As a TSO may be issued for an exclusively USML item, inclusion of TSOs is not appropriate here.

Eleven (11) commenting parties recommended the eleventh sentence of the explanatory note change ''unpublished civil aviation industry specifications'' to ''unpublished (e.g., proprietary) manufacturer's specifications.'' Also, it was recommended to add ''bolts'' to the e.g. list. The Department believes that many of the concerns raised with regard to sentences ten and eleven are alleviated when the two sentences are read together. Parts and components meeting published industry or government specifications or established but unpublished (e.g., proprietary) industry standards are considered standard equipment. Also, the recommendation to add bolts was not adopted.

Eleven (11) commenting parties recommended the twelfth sentence of the explanatory note be deleted, noting that aircraft parts are routinely tested beyond the applicable specification for a variety of reasons, including marketing purposes or warranty obligations. This recommendation was not adopted. If a part is required to exceed established standards, such requirements call into question whether it is a ''standard part.''

Ten (10) commenting parties recommended the thirteenth sentence of the explanatory note delete ''unless the item was designed or modified to meet that specification or standard.'' That change was adopted.

Fourteen (14) commenting parties recommended the fourteenth sentence of the explanatory note clarify the jurisdiction of exporting spare parts when the part or component is not installed in the aircraft at the time of export. The Department believes it is clear that parts and components that meet the section 17(c) criteria, when exported separately are subject to EAR jurisdiction.

Five (5) commenting parties recommended the fifteenth sentence of the explanatory note add ''APUs, seats, and flaps'' to the e.g. parenthesis. This change was not adopted. We believe the examples provided are sufficient, and note that not all APUs, seats, and flaps are subject to Department of Commerce jurisdiction.

One (1) commenting party objected to disqualifying ''unique application parts or components not integral to the aircraft'' in the sixteenth sentence of the explanatory note. Section 17(c) applies to standard parts and components integral to the aircraft. Parts that are not standard or are not integral to the aircraft are clearly not included in Section 17(c), and are therefore not included here.

*Regulatory Analysis and Notices*

Administrative Procedure Act

This amendment involves a foreign affairs function of the United States and, therefore, is not subject to the procedures contained in 5 U.S.C. 553 and 554.

Regulatory Flexibility Act

Since this amendment involves a foreign affairs function of the United States, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This amendment will not have substantial effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this amendment.

Executive Order 12866

This amendment is exempt from the review under Executive Order 12866, but has been reviewed internally by the Department of State to ensure consistency with the purposes thereof.

Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

**List of Subjects in 22 CFR Part 121**

Arms and munitions, Exports, U.S. munitions list.

■ Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 121 is amended as follows:

## PART 121—THE UNITED STATES MUNITIONS LIST

■ 1. The authority citation for part 121 continues to read as follows:

**Authority:** Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp, p. 79; 22 U.S.C. 2658; Pub L. 105–261, 112 Stat. 1920.

■ 2. In § 121.1, paragraph (c) Category VIII is amended by revising Category VIII paragraphs (b) and (h) to read as follows:

**§ 121.1 General. The United States Munitions List.**

* * * * *

**Category VIII—Aircraft and Associated Equipment**

* * * * *

*(b) Military aircraft engines, except reciprocating engines, specifically designed or modified for the aircraft in paragraph (a) of this category, and all specifically designed military hot section components (i.e., combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; cooled augmenters; and cooled nozzles) and digital engine controls (e.g., Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC)). However, if such military hot section components and digital engine controls are manufactured to engineering drawings dated on or before January 1, 1970, with no subsequent changes or

revisions to such drawings, they are controlled under Category VIII(h).

* * * * *

(h) Components, parts, accessories, attachments, and associated equipment (including ground support equipment) specifically designed or modified for the articles in paragraphs (a) through (d) of this category, excluding aircraft tires and propellers used with reciprocating engines.

**Note:** The Export Administration Regulations (EAR) administered by the Department of Commerce control any component, part, accessory, attachment, and associated equipment (including propellers) designed exclusively for civil, non-military aircraft (see § 121.3 of this subchapter for the definition of military aircraft) and control any component, part, accessory, attachment, and associated equipment designed exclusively for civil, non-military aircraft engines. The International Traffic in Arms Regulations administered by the Department of State control any component, part, accessory, attachment, and associated equipment designed, developed, configured, adapted or modified for military aircraft, and control any component, part, accessory, attachment, and associated equipment designed, developed, configured, adapted or modified for military aircraft engines. For components and parts that do not meet the above criteria, including those that may be used on either civil or military aircraft, the following requirements apply. A non-SME component or part (as defined in §§ 121.8(b) and (d) of this subchapter) that is not controlled under another category of the USML, that: (a) Is standard equipment; (b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for a civil, non-military aircraft (this expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft); and (c) is an integral part of such civil aircraft, is subject to the jurisdiction of the EAR. In the case of any part or component designated as SME in this or any other USML category, a determination that such item may be excluded from USML coverage based on the three criteria above always requires a commodity jurisdiction determination by the Department of State under § 120.4 of this subchapter. The only exception to this requirement is where a part or component designated as SME in this category was integral to civil aircraft prior to August 14, 2008. For such part or component, U.S. exporters are not required to seek a commodity jurisdiction determination from State, unless doubt exists as to whether the item meets the three criteria above (See § 120.3 and § 120.4 of this subchapter). Also, U.S. exporters are not required to seek a commodity jurisdiction determination from State regarding any non-SME component or part (as defined in §§ 121.8(b) and (d) of this subchapter) that is not controlled under another category of the USML, unless doubt exists as to whether the item meets the three criteria above (See § 120.3 and § 120.4 of this subchapter). These commodity jurisdiction determinations will ensure compliance with this section and the criteria of Section 17(c) of the Export Administration Act of 1979. In determining whether the three criteria above have been met, consider whether the same item is common to both civil and military applications without modification of the item's form, fit, or function. Some examples of parts or components that are not common to both civil and military applications are tail hooks, rotodomes, and low observable rotor blades. ''Standard equipment'' is defined as a part or component manufactured in compliance with an established and published industry specification or an established and published government specification (e.g., AN, MS, NAS, or SAE). Parts and components that are manufactured and tested to established but unpublished civil aviation industry specifications and standards are also ''standard equipment,'' e.g., pumps, actuators, and generators. A part or component is not standard equipment if there are any performance, manufacturing or testing requirements beyond such specifications and standards. Simply testing a part or component to meet a military specification or standard for civil purposes does not in and of itself change the jurisdiction of such part or component. Integral is defined as a part or component that is installed in an aircraft. In determining whether a part or component may be considered as standard equipment and integral to a civil aircraft (e.g., latches, fasteners, grommets, and switches) it is important to carefully review all of the criteria noted above. For example, a part approved solely on a non-interference/provisions basis under a type certificate issued by the Federal Aviation Administration would not qualify. Similarly, unique application parts or components not integral to the aircraft would also not qualify.

* * * * *

Dated: August 4, 2008.

**John C. Rood,**

*Acting Under Secretary for Arms Control and International Security, Department of State.*

[FR Doc. E8–18844 Filed 8–13–08; 8:45 am]

**BILLING CODE 4710–25–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 1 and 602

**[TD 9422]**

**RIN 1545–BE95**

## S Corporation Guidance Under AJCA of 2004 and GOZA of 2005

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations that provide guidance regarding certain changes made to the rules governing S corporations under the American Jobs Creation Act of 2004 and the Gulf Opportunity Zone Act of 2005. The final regulations replace obsolete references in the current regulations and allow taxpayers to make proper use of the provisions that made changes to prior law. The final regulations include guidance on the S corporation family shareholder rules, the definitions of ''powers of appointment'' and ''potential current beneficiaries'' (PCBs) with regard to electing small business trusts (ESBTs), the allowance of suspended losses to the spouse or former spouse of an S corporation shareholder, and relief for inadvertently terminated or invalid qualified subchapter S subsidiary (QSub) elections. The final regulations affect S corporations and their shareholders.

**DATES:** *Effective Date:* These regulations are effective on *August 14, 2008.*

*Applicability Dates:* For dates of applicability, see §§ 1.1361–4(a)(9)(ii), 1.1361–6, 1.1362–4(g) and 1.1366–5.

**FOR FURTHER INFORMATION CONTACT:** Charles J. Langley, Jr., (202) 622–3060 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2114.

The collection of information is required by § 1.1361–1(m)(2)(ii)(A) of these final regulations. This information is required to enable the IRS to verify whether the corporation is an eligible S corporation.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) concerning S corporations under sections 1361, 1362, and 1366 of the Internal Revenue Code (Code). These

sections were amended by sections 231, 232, 233, 234, 235, 236, 237, 238, and 239 of the American Jobs Creation Act of 2004 (Pub. L. 108–357, 118 Stat. 1418) (the 2004 Act) and sections 403 and 413 of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135) (the 2005 Act). This document does not address other amendments made by the 2004 Act or the 2005 Act. In addition, this document contains additional amendments to the regulations under Code section 1362 necessary to conform the regulations to the changes made by section 1305(a) of the Small Business Job Protection Act of 1996 (Pub. L. 104–188, 110 Stat. 1755) (the 1996 Act).

On September 28, 2007, a notice of proposed rulemaking and a notice of public hearing (REG–143326–05) were published in the **Federal Register** (72 FR 55132).

No one requested to speak at the public hearing. Accordingly, the public hearing scheduled for January 16, 2008, was cancelled in a notice published in the **Federal Register** (73 FR 1131) on January 7, 2008. No one submitted written or electronic comments, which were due by December 27, 2007. Thus, the proposed regulations are adopted as revised by this Treasury decision, which make only administrative or ministerial changes to the proposed regulations.

The proposed regulations conformed references in the regulations to the specific numbers of S corporation shareholders permissible under section 1361. For purposes of determining the number of shareholders of an S corporation under Code section 1361(b)(1)(A), the proposed regulations provided rules relating to stock owned by family members.

Pursuant to section 1361(c)(2)(A)(vi), the proposed regulations provided rules regarding limited instances in which individual retirement accounts (including Roth IRAs), qualify as eligible shareholders of banks or depository institution holding companies.

The proposed regulations provided that a disposition of the S corporation stock by a QSST shall be treated as a disposition by the income beneficiary for purposes of applying sections 465 and 469 to the income beneficiary of a QSST.

The proposed regulations described information that is required to be included in the ESBT election statement if the trust includes a power of appointment or other power to make distributions to certain organizations. The proposed regulations provided rules under which a person that may receive a distribution under a power of appointment will not be treated as a PCB. Also, the proposed regulations provided rules under which a class of organizations described in section 1361(c)(6) will be treated as one PCB if the fiduciary has a power (other than a power of appointment) to make distributions to one or more members of the class. Also, the proposed regulations provided rules that any person who first met the definition of a PCB one year before the disposition by an ESBT of all of the stock of the S corporation will not be treated as a PCB or a shareholder of the S corporation.

The proposed regulations provided that the Commissioner may provide relief for inadvertent invalid elections to be an S corporation or QSub or for inadvertent terminations of valid elections to be an S corporation or QSub and described the requirements to obtain that relief.

Finally, with regard to a transfer of stock under Code section 1041(a), between spouses or incident to a divorce, the proposed regulations provided for the treatment of losses or deductions with respect to the transferred shares that are subject to the basis limitation under Code section 1366(d)(1).

**Summary of Comments and Explanation of Revisions**

No comments were received. All revisions are administrative or ministerial and substantively conform to the proposed regulations.

**Effect on Other Documents**

The following publication is obsoleted as of *August 14, 2008*:

Notice 2005–91 (2005–2 CB 1164).

**Effective Applicability Date**

These regulations are effective on *August 14, 2008*.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Further, it has been determined that these regulations are not subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6) because the collection of information required by these regulations is imposed on electing small business trusts and such entities are not ''small entities'' for purposes of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Additionally, the information collection burden imposed on the electing small business trusts is minimal. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rule making preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**Drafting Information**

The principal author of these proposed regulations is Charles J. Langley, Jr. of the Office of Associate Chief Counsel (Passthroughs and Special Industries).

**List of Subjects**

*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

*26 CFR Part 602*

Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.1361–0 is amended by adding a new entry in the table of contents for § 1.1361–1(e)(3) to read as follows:

**§ 1.1361–0 Table of contents.**

* * * * *

**§ 1.1361–1 S Corporation defined.**

* * * * *

(e) * * *

(3) Special rules relating to stock owned by members of a family.

* * * * *

■ **Par. 3.** Section 1.1361–1 is amended by:

■ 1. Revising paragraphs (b)(1)(i) and (e)(1).

■ 2. Adding paragraphs (e)(3), (h)(1)(vii), and (h)(3)(i)(G).

■ 3. Adding a new sentence to the end of paragraphs (j)(8) and (k)(2)(i).

■ 4. Revising paragraphs (m)(2)(ii)(A), (m)(4)(iii), and (m)(4)(vi).

■ 5. Revising paragraphs (m)(8), *Example 2* and *Example 7*.

■ 6. Revising the seventh sentence of paragraph (m)(8), *Example 5*.

■ 7. Adding paragraphs (m)(8), *Example 8* and *Example 9*.

■ 8. Adding a sentence to the end of paragraph (m)(9).

The revisions and additions read as follows:

**§ 1.1361–1 S Corporation defined.**

* * * * *

(b) * * *

(1) * * *

(i) More than the number of shareholders provided in section 1361(b)(1)(A);

* * * * *

(e) *Number of shareholders*—(1) *General rule.* A corporation does not qualify as a small business corporation if it has more than the number of shareholders provided in section 1361(b)(1)(A). Ordinarily, the person who would have to include in gross income dividends distributed with respect to the stock of the corporation (if the corporation were a C corporation) is considered to be the shareholder of the corporation. For example, if stock (owned other than by a husband and wife or members of a family described in section 1361(c)(1)) is owned by tenants in common or joint tenants, each tenant in common or joint tenant is generally considered to be a shareholder of the corporation. (For special rules relating to stock owned by husband and wife or members of a family, see paragraphs (e)(2) and (3) of this section, respectively; for special rules relating to restricted stock, see paragraphs (b)(3) and (6) of this section.) The person for whom stock of a corporation is held by a nominee, guardian, custodian, or an agent is considered to be the shareholder of the corporation for purposes of this paragraph (e) and paragraphs (f) and (g) of this section. For example, a partnership may be a nominee of S corporation stock for a person who qualifies as a shareholder of an S corporation. However, if the partnership is the beneficial owner of the stock, then the partnership is the shareholder, and the corporation does not qualify as a small business corporation. In addition, in the case of stock held for a minor under a uniform transfers to minors act or similar statute, the minor and not the custodian is the shareholder. Except as otherwise provided in paragraphs (h) and (j) of this section, and for purposes of this paragraph (e) and paragraphs (f) and (g) of this section, if stock is held by a decedent's estate or a trust described in section 1361(c)(2)(A)(ii) or (iii), the estate or trust (and not the beneficiaries of the estate or trust) is considered to be the shareholder; however, if stock is held by a subpart E trust (which includes a voting trust) or an electing QSST described in section 1361(d)(1), the deemed owner of the trust is considered to be the shareholder. If stock is held by an ESBT described in section 1361(c)(2)(A)(v), each potential current beneficiary of the trust shall be treated as a shareholder, except that the trust shall be treated as the shareholder during any period in which there is no potential current beneficiary of the trust. If stock is held by a trust described in section 1361(c)(2)(A)(vi), the individual for whose benefit the trust was created shall be treated as the shareholder. See paragraph (h) of this section for special rules relating to trusts.

* * * * *

(3) *Special rules relating to stock owned by members of a family*—(i) *In general.* For purposes of paragraph (e)(1) of this section, stock owned by members of a family is treated as owned by one shareholder. Members of a family include a common ancestor, any lineal descendant of the common ancestor (without any generational limit), and any spouse (or former spouse) of the common ancestor or of any lineal descendants of the common ancestor. An individual shall not be considered to be a common ancestor if, on the applicable date, the individual is more than six generations removed from the youngest generation of shareholders who would be members of the family determined by deeming that individual as the common ancestor. For purposes of this six-generation test, a spouse (or former spouse) is treated as being of the same generation as the individual to whom the spouse is or was married. This test is applied on the latest of the date the election under section 1362(a) is made for the corporation, the earliest date that a member of the family (determined by deeming that individual as the common ancestor) holds stock in the corporation, or October 22, 2004. For this purpose, the date the election under section 1362(a) is made for the corporation is the effective date of the election, not the date it is signed or received by any person. The test is only applied as of the applicable date, and lineal descendants (and spouses) more than six generations removed from the common ancestor will be treated as members of the family even if they acquire stock in the corporation after that date. The members of a family are treated as one shareholder under this paragraph (e)(3) solely for purposes of section 1361(b)(1)(A), and not for any other purpose, whether under section 1361 or any other provision. Specifically, each member of the family who owns or is deemed to own stock must meet the requirements of sections 1361(b)(1)(B) and (C) (regarding permissible shareholders) and section 1362(a)(2) (regarding shareholder consents to an S corporation election). Although a person may be a member of more than one family under this paragraph (e)(3), each family (not all of whose members are also members of the other family) will be treated as one shareholder. For purposes of this paragraph (e)(3), any legally adopted child of an individual, any child who is lawfully placed with an individual for legal adoption by that individual, and any eligible foster child of an individual (within the meaning of section 152(f)(1)(C)), shall be treated as a child of such individual by blood.

(ii) *Certain entities treated as members of a family.* For purposes of this paragraph (e)(3), the estate or trust (described in section 1361(c)(2)(A)(ii) or (iii)) of a deceased member of the family will be considered to be a member of the family during the period in which the estate or such trust (if the trust is described in section 1361(c)(2)(A)(ii) or (iii)), holds stock in the S corporation. The members of the family also will include—

(A) In the case of an ESBT, each potential current beneficiary who is a member of the family;

(B) In the case of a QSST, the income beneficiary who makes the QSST election, if that income beneficiary is a member of the family;

(C) In the case of a trust created primarily to exercise the voting power of stock transferred to it, each beneficiary who is a member of the family;

(D) The individual for whose benefit a trust described in section 1361(c)(2)(A)(vi) was created, if that individual is a member of the family;

(E) The deemed owner of a trust described in section 1361(c)(2)(A)(i) if that deemed owner is a member of the family; and

(F) The owner of an entity disregarded as an entity separate from its owner under § 301.7701–3 of this chapter, if that owner is a member of the family.

* * * * *

(h) * * *

(1) * * *

(vii) *Individual retirement accounts.* In the case of a corporation which is a bank (as defined in section 581) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1)), a trust which constitutes an individual retirement account under section 408(a), including one designated as a Roth IRA under section 408A, but only to the extent of the stock held by such trust in such bank or company as of October 22, 2004. Individual retirement accounts

(including Roth IRAs) are not otherwise eligible S corporation shareholders.

* * * * *

(3) * * *

(i) * * *

(G) If stock in an S corporation bank or depository institution holding company is held by an individual retirement account (including a Roth IRA) described in paragraph (h)(1)(vii) of this section, the individual for whose benefit the trust was created shall be treated as the shareholder.

* * * * *

(j) * * *

(8) * * * However, solely for purposes of applying sections 465 and 469 to the income beneficiary, a disposition of S corporation stock by a QSST shall be treated as a disposition by the income beneficiary.

* * * * *

(k) * * *

(2) * * *

(i) * * * Paragraphs (b)(1)(i), (e)(1), (e)(3), (h)(1)(vii), (h)(3)(i)(G), and the fifth sentence of paragraph (j)(8) are effective on *August 14, 2008*.

* * * * *

(m) * * *

(2) * * *

(ii) * * *

(A) The name, address, and taxpayer identification number of the trust, the potential current beneficiaries, and the S corporations in which the trust currently holds stock. If the trust includes a power described in paragraph (m)(4)(vi)(B) of this section, then the election statement must include a statement that such a power is included in the instrument, but does not need to include the name, address, or taxpayer identification number of any particular charity or any other information regarding the power.

* * * * *

(4) * * *

(iii) *Special rule for dispositions of stock*. Notwithstanding the provisions of paragraph (m)(4)(i) of this section, if a trust disposes of all of the stock which it holds in an S corporation, then, with respect to that corporation, any person who first met the definition of a potential current beneficiary during the 1-year period ending on the date of such disposition is not a potential current beneficiary and thus is not a shareholder of that corporation.

* * * * *

(vi) *Currently exercisable powers of appointment and other powers—(A) Powers of appointment.* A person to whom a distribution may be made during any period pursuant to a power of appointment (as described for transfer tax purposes in section 2041 and § 20.2041–1(b) of this chapter and section 2514 and § 25.2514–1(b) of this chapter) is not a potential current beneficiary unless the power is exercised in favor of that person during the period. It is immaterial for purposes of this paragraph (m)(4)(vi)(A) whether such power of appointment is a ''general power of appointment'' for transfer tax purposes as described in §§ 20.2041–1(c) and 25.2514–1(c) of this chapter. The mere existence of one or more powers of appointment during the lifetime of a power holder that would permit current distributions from the trust to be made to more than the number of persons described in section 1361(b)(1)(A) or to a person described in section 1361(b)(1)(B) or (C) will not cause the S corporation election to terminate unless one or more of such powers are exercised, collectively, in favor of an excessive number of persons or in favor of a person who is ineligible to be an S corporation shareholder. For purposes of this paragraph (m)(4)(vi)(A), a ''power of appointment'' includes a power, regardless of by whom held, to add a beneficiary or class of beneficiaries to the class of potential current beneficiaries, but generally does not include a power held by a fiduciary who is not also a beneficiary of the trust to spray or sprinkle trust distributions among beneficiaries. Nothing in this paragraph (m)(4)(vi)(A) alters the definition of ''power of appointment'' for purposes of any provision of the Internal Revenue Code or the regulations.

(B) *Powers to distribute to certain organizations not pursuant to powers of appointment.* If a trustee or other fiduciary has a power (that does not constitute a power of appointment for transfer tax purposes as described in §§ 20.2041–1(b) and 25.2514–1(b) of this chapter) to make distributions from the trust to one or more members of a class of organizations described in section 1361(c)(6), such organizations will be counted collectively as only one potential current beneficiary for purposes of this paragraph (m), except that each organization receiving a distribution also will be counted as a potential current beneficiary. This paragraph (m)(4)(vi)(B) shall not apply to a power to currently distribute to one or more particular charitable organizations described in section 1361(c)(6). Each of such organizations is a potential current beneficiary of the trust.

* * * * *

(8) * * *

*Example 2.* (i) *Invalid potential current beneficiary.* Effective January 1, 2005, Trust makes a valid ESBT election. On January 1, 2006, *A*, a nonresident alien, becomes a potential current beneficiary of Trust. Trust does not dispose of all of its S corporation stock within one year after January 1, 2006. As of January 1, 2006, *A* is the potential current beneficiary of Trust and therefore is treated as a shareholder of the S corporation. Because *A* is not an eligible shareholder of an S corporation under section 1361(b)(1), the S corporation election of any corporation in which Trust holds stock terminates effective January 1, 2006. Relief may be available under section 1362(f).

(ii) *Invalid potential current beneficiary and disposition of S stock.* Assume the same facts as in *Example 2* (i) except that within one year after January 1, 2006, trustee of Trust disposes of all Trust's S corporation stock. *A* is not considered a potential current beneficiary of Trust and therefore is not treated as a shareholder of any S corporation in which Trust previously held stock.

* * * * *

*Example 5.* * * * Trust-2 itself will not be counted toward the shareholder limit of section 1361(b)(1)(A). * * *

* * * * *

*Example 7. Potential current beneficiaries and powers of appointment. M* creates Trust from which *A* has a right to all net income and funds it with S corporation stock. *A* also has a currently exercisable power to appoint income or principal to anyone except *A*, *A*'s creditors, *A*'s estate, and the creditors of A's estate. The potential current beneficiaries of Trust for any period will be *A* and each person who receives a distribution from Trust pursuant to *A*'s exercise of *A*'s power of appointment during that period.

*Example 8. Power to distribute to an unlimited class of charitable organizations not pursuant to a power of appointment. M* creates Trust from which *A* has a right to all net income and funds it with S corporation stock. In addition, the trustee of Trust, who is not *A* or a descendant of *M*, has the power to make discretionary distributions of principal to the living descendants of *M* and to any organizations described in section 1361(c)(6). The potential current beneficiaries of Trust for any period will be *A*, each then-living descendant of M, and each exempt organization described in section 1361(c)(6) that receives a distribution during that period. In addition, the class of exempt organizations will be counted as one potential current beneficiary.

*Example 9. Power to distribute to a class of named charitable organizations not pursuant to a power of appointment. M* creates Trust from which *A* has a right to all net income and funds it with S corporation stock. In addition, the trustee of Trust, who is not *A* or a descendant of *M*, has the power to make discretionary distributions of principal to the living descendants of *M* and to *X, Y,* and *Z*, each of which is an organization described in section 1361(c)(6). The potential current beneficiaries of Trust for any period will be *A, X, Y, Z*, and each living descendant of *M*.

(9) *Effective/applicability date.* * * * Paragraphs (m)(2)(ii)(A), (m)(4)(iii) and

(vi), and (m)(8), *Example 2, Example 5, Example 7, Example 8*, and *Example 9* of this section are effective on *August 14, 2008*.

■ **Par. 4.** Section 1.1361–4 is amended by revising paragraph (a)(1) and adding new paragraph (a)(9) to read as follows:

**§ 1.1361–4 Effect of QSub election.**

(a) *Separate existence ignored*—(1) *In general*. Except as otherwise provided in paragraphs (a)(3), (a)(6), (a)(7), (a)(8), and (a)(9) of this section, for Federal tax purposes—

(i) A corporation that is a QSub shall not be treated as a separate corporation; and

(ii) All assets, liabilities, and items of income, deduction, and credit of a QSub shall be treated as assets, liabilities, and items of income, deduction, and credit of the S corporation.

* * * * *

(9) *Information returns*—(i) *In general*. Except to the extent provided by the Secretary or Commissioner in guidance (including forms or instructions), paragraph (a)(1) of this section shall not apply to part III of subchapter A of chapter 61, relating to information returns.

(ii) *Effective/applicability date*. This paragraph (a)(9) is effective on *August 14, 2008*.

* * * * *

■ **Par. 5.** Section 1.1361–6 is amended by revising the first sentence to read as follows:

**§ 1.1361–6 Effective date.**

Except as provided in §§ 1.1361–4(a)(3)(iii), 1.1361–4(a)(5)(i), 1.1361–4(a)(6)(iii), 1.1361–4(a)(7)(ii), 1.1361–4(a)(8)(ii), 1.1361–4(a)(9), and 1.1361–5(c)(2), the provisions of §§ 1.1361–2 through 1.1361–5 apply to taxable years beginning on or after January 20, 2000; however, taxpayers may elect to apply the regulations in whole, but not in part (aside from those sections with special dates of applicability), for taxable years beginning on or after January 1, 2000, provided all affected taxpayers apply the regulations in a consistent manner.

* * *

■ **Par. 6.** Section 1.1362–0 is amended by revising the heading of the table of contents for § 1.1362–4 and adding a new entry in the table of contents for § 1.1362–4(g) to read as follows:

**§ 1.1362–0 Table of contents.**

* * * * *

**§ 1.1362–4 Inadvertent terminations and inadvertently invalid elections.**

* * * * *

(g) *Effective/applicability date.*

* * * * *

■ **Par. 7.** Section 1.1362–4 is amended by:

■ 1. Revising the section heading and paragraphs (a), (b), (c), (d), and (f).

■ 2. Adding paragraph (g).

The addition and revisions read as follows:

**§ 1.1362–4 Inadvertent terminations and inadvertently invalid elections.**

(a) *In general*. A corporation is treated as continuing to be an S corporation or a QSub (or, an invalid election to be either an S corporation or a QSub is treated as valid) during the period specified by the Commissioner if—

(1) The corporation made a valid election under section 1362(a) or section 1361(b)(3) and the election terminated or the corporation made an election under section 1362(a) or section 1361(b)(3) that was invalid;

(2) The Commissioner determines that the termination or invalidity was inadvertent;

(3) Within a reasonable period of time after discovery of the terminating event or invalid election, steps were taken so that the corporation for which the election was made or the termination occurred is a small business corporation or a QSub, as the case may be, or to acquire the required shareholder consents; and

(4) The corporation and shareholders agree to adjustments that the Commissioner may require for the period.

(b) *Inadvertent termination or inadvertently invalid election*. For purposes of paragraph (a) of this section, the determination of whether a termination or invalid election was inadvertent is made by the Commissioner. The corporation has the burden of establishing that under the relevant facts and circumstances the Commissioner should determine that the termination or invalid election was inadvertent. The fact that the terminating event or invalidity of the election was not reasonably within the control of the corporation and, in the case of a termination, was not part of a plan to terminate the election, or the fact that the terminating event or circumstance took place without the knowledge of the corporation, notwithstanding its due diligence to safeguard itself against such an event or circumstance, tends to establish that the termination or invalidity of the election was inadvertent.

(c) *Corporation's request for determination of an inadvertent termination or invalid election*. A corporation that believes that the termination or invalidity of its election was inadvertent may request a determination from the Commissioner that the termination or invalidity of its election was inadvertent. The request is made in the form of a ruling request and should set forth all relevant facts pertaining to the event or circumstance including, but not limited to, the facts described in paragraph (b) of this section, the date of the corporation's election (or intended election) under section 1362(a) or 1361(b)(3), a detailed explanation of the event or circumstance causing the termination or invalidity, when and how the event or circumstance was discovered, and the steps taken under paragraph (a)(3) of this section.

(d) *Adjustments*. The Commissioner may require any adjustments that are appropriate. In general, the adjustments required should be consistent with the treatment of the corporation as an S corporation or QSub during the period specified by the Commissioner. In the case of stock held by an ineligible shareholder that causes an inadvertent termination or invalid election for an S corporation under section 1362(f), the Commissioner may require the ineligible shareholder to be treated as a shareholder of the S corporation during the period the ineligible shareholder actually held stock in the corporation. Moreover, the Commissioner may require protective adjustments that prevent the loss of any revenue due to the holding of stock by an ineligible shareholder (for example, a nonresident alien).

* * * * *

(f) *Status of corporation*. The status of the corporation after the terminating event or invalid election and before the determination of inadvertence is determined by the Commissioner. Inadvertent termination or inadvertent invalid election relief may be granted retroactively for all years for which the terminating event or circumstance giving rise to invalidity is effective, in which case the corporation is treated as if its election was valid or had not terminated. Alternatively, relief may be granted only for the period in which the corporation became eligible for subchapter S or QSub treatment, in which case the corporation is treated as a C corporation or, in the case of a QSub with an inadvertently terminated or invalid election, as a separate C corporation, during the period for which the corporation was not eligible for its intended status.

(g) *Effective/applicability date*. Paragraphs (a), (b), (c), (d), and (f) of this section are effective on *August 14, 2008*.

■ **Par. 8.** Section 1.1366–0 is amended by adding new entries in the table of

contents for § 1.1366–2(a)(5)(i), (a)(5)(ii) and (a)(5)(iii) to read as follows:

**§ 1.1366–0 Table of contents.**

* * * * *

**§ 1.1366–2 Limitations on deduction of passthrough items of an S corporation to its shareholders.**

(a) * * *

(5) * * *

(i) *In general.*

(ii) *Exceptions for transfers of stock under section 1041(a).*

(iii) *Examples.*

■ **Par. 9.** Section 1.1366–2(a)(5) is amended by:

■ 1. Redesignating paragraph (a)(5) as (a)(5)(i).

■ 2. Adding a heading and revising the first sentence of paragraph (a)(5)(i).

■ 3. Adding paragraphs (a)(5)(ii) and (a)(5)(iii).

The revisions and additions read as follows:

**§ 1.1366–2 Limitations on deduction of passthrough items of an S corporation to its shareholders.**

(a) *In general.* * * *

(5) *Nontransferability of losses and deductions*—(i) *In general.* Except as provided in paragraph (a)(5)(ii) of this section, any loss or deduction disallowed under paragraph (a)(1) of this section is personal to the shareholder and cannot in any manner be transferred to another person. * * *

(ii) *Exceptions for transfers of stock under section 1041(a).* If a shareholder transfers stock of an S corporation after December 31, 2004, in a transfer described in section 1041(a), any loss or deduction with respect to the transferred stock that is disallowed to the transferring shareholder under paragraph (a)(1) of this section shall be treated as incurred by the corporation in the following taxable year with respect to the transferee spouse or former spouse. The amount of any loss or deduction with respect to the stock transferred shall be determined by prorating any losses or deductions disallowed under paragraph (a)(1) of this section for the year of the transfer between the transferor and the spouse or former spouse based on the stock ownership at the beginning of the following taxable year. If a transferor claims a deduction for losses in the taxable year of transfer, then under paragraph (a)(4) of this section, if the transferor's pro rata share of the losses and deductions in the year of transfer exceeds the transferor's basis in stock and the indebtedness of the corporation to the transferor, then the limitation must be allocated among the transferor spouse's pro rata share of each loss or deduction, including disallowed losses and deductions carried over from the prior year.

(iii) *Examples.* The following examples illustrates the provisions of paragraph (a)(5)(ii) of this section:

*Example 1. A* owns all 100 shares in *X*, a calendar year S corporation. For *X*'s taxable year ending December 31, 2006, *A* has zero basis in the shares and *X* does not have any indebtedness to *A*. For the 2006 taxable year, *X* had $100 in losses that *A* cannot use because of the basis limitation in section 1366(d)(1) and that are treated as incurred by the corporation with respect to *A* in the following taxable year. Halfway through the 2007 taxable year, *A* transfers 50 shares to *B, A*'s former spouse in a transfer to which section 1041(a) applies. In the 2007 taxable year, *X* has $80 in losses. On *A*'s 2007 individual income tax return, *A* may use the entire $100 carryover loss from 2006, as well as *A*'s share of the $80 2007 loss determined under section 1377(a) ($60), assuming A acquires sufficient basis in the *X* stock. On *B*'s 2007 individual income tax return, *B* may use *B*'s share of the $80 2007 loss determined under section 1377(a) ($20), assuming *B* has sufficient basis in the *X* stock. If any disallowed 2006 loss is disallowed to *A* under section 1366(d)(1) in 2007, that loss is prorated between *A* and *B* based on their stock ownership at the beginning of 2008. On *B*'s 2008 individual income tax return, *B* may use that loss, assuming *B* acquires sufficient basis in the *X* stock. If neither *A* nor *B* acquires any basis during the 2007 taxable year, then as of the beginning of 2008, the corporation will be treated as incurring $50 of loss with respect to *A* and $50 of loss with respect to *B* for the $100 of disallowed 2006 loss, and the corporation will be treated as incurring $60 of loss with respect to *A* and $20 with respect to *B* for the $80 of disallowed 2007 loss.

*Example 2.* Assume the same facts as *Example 1*, except that during the 2007 taxable year, *A* acquires $10 of basis in *A*'s shares in *X*. For the 2007 taxable year, *A* may claim a $10 loss deduction, which represents $6.25 of the disallowed 2006 loss of $100 and $3.75 of *A*'s 2007 loss of $60. The disallowed 2006 loss is reduced to $93.75. As of the beginning of 2008, the corporation will be treated as incurring half of the remaining $93.75 of loss with respect to *A* and half of that loss with respect to *B* for the remaining $93.75 of disallowed 2006 loss, and if *B* does not acquire any basis during 2007, the corporation will be treated as incurring $56.25 of loss with respect to *A* and $20 with respect to *B* for the remaining disallowed 2007 loss.

* * * * *

■ **Par. 10.** Section 1.1366–5 is amended by adding a new sentence at the end to read as follows:

**§ 1.1366–5 Effective/applicability date.**

* * * Sections 1.1366–2(a)(5)(i), (ii) and (iii) are effective on August 14, 2008.

## PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 11.** The authority citation for part 602 continues to read as follows:

**Authority:** 26 U.S.C. 7805.

■ **Par. 12.** Section 602.101, paragraph (b) is amended by adding the entry in numerical order to the table to read as follows:

**§ 602.101 OMB Control numbers.**

* * * * *

(b) * * *

| CFR part or section where identified and described | Current OMB control No. |
|---|---|
| * * * * * | |
| 1.1361–1 ..... | 1545–2114 |
| * * * * * | |

**Sherri L. Brown,**

*Acting Deputy Commissioner for Services and Enforcement.*

Approved: August 5, 2008.

**Eric Solomon,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. E8–18782 Filed 8–13–08; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 100

**[Docket No. USCG–2008–0789]**

**RIN 1625–AA08**

## Special Local Regulation; Cape Fear Dragon Boat Festival, Wilmington, NC

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Cape Fear Dragon Boat Festival will take place on the Cape Fear River in Wilmington, North Carolina on September 27, 2008. This event will consist of four 45 foot long Dragon boats racing a 250 meter course.

**DATES:** This rule is effective from 8 a.m. to 6 p.m. on September 27, 2008.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0789 and are available online at www.regulations.gov. They are also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of

Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and at Commander, Coast Guard Sector North Carolina, 2301 East Fort Macon Rd., Atlantic Beach, North Carolina 28512 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call the Marine Event Coordinator at Coast Guard Sector North Carolina, C. D. Humphrey at (252) 247–4570. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Information**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because a delay in publication would be contrary to the public interest since immediate action is needed to protect the maritime public during the event. In order to ensure the safety of life on navigable waters during this event, the Coast Guard is establishing a special local regulation. The Coast Guard will issue a broadcast notice to mariners to advise mariners of the restriction and on scene Coast Guard and Coast Guard Auxiliary vessels will also provide additional notice to mariners.

**Background and Purpose**

On September 27, 2008, the Cape Fear Dragon Boat Club will sponsor the ''Cape Fear River Dragon Boat Festival.'' This festival will include four 45 foot long Dragon Boats racing a straight line course 250 meters in length. The races will take place on the Cape Fear River in front of the Wilmington River Walk, approximately 0.5 nautical miles north of the Cape Fear River Memorial Bridge. To provide for the safety of participants, spectators and other transiting vessels, the Coast Guard will temporarily restrict vessel traffic in the event area during the races.

**Discussion of Rule**

The Coast Guard is establishing a special local regulation on specified waters of the Cape Fear River, Wilmington, North Carolina. The special local regulation includes all waters from shoreline to shoreline, bound by the following position latitude 34°14′24″ N, longitude 77°57′08″ W thence south along the east bank of the river to latitude 34°14′00″ N, longitude 77°56′58″ W, thence west to latitude 34°14′00″ N, longitude 77°57′05″ W, thence north along the west bank to latitude 34°14′24″ N, longitude 77°57′21″ W, thence east back to the point of origin. All coordinates reference Datum NAD 1983. The special local regulation will be in effect from 8 a.m. to 6 p.m. on September 27, 2008. The effect will be to restrict general navigation in the regulated area during the races. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area during the enforcement period. The Patrol Commander will notify the public of specific enforcement times by Marine Radio Safety Broadcast. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

**Regulatory Analyses**

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

**Regulatory Planning and Review**

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. Although this regulation prevents traffic from transiting a portion of the Cape Fear River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect. Extensive advance notification will be made to the maritime community via marine information broadcasts, local radio stations and area newspapers so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on the maritime public yet provide the level of safety deemed necessary. Vessel traffic will be able to transit the regulated area between races, when the Coast Guard Patrol Commander deems it is safe to do so.

**Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit this section of the Cape Fear River from 8 a.m. to 6 p.m. on September 27, 2008. This rule will not have a significant economic impact on a substantial number of small entities for the following reasons:

(i) Although the regulated area will apply to the section of the Cape Fear River approximately 0.5 nautical miles north of the Cape Fear Memorial Bridge, traffic may be allowed to pass through the regulated area with the permission of the Coast Guard Patrol Commander;

(ii) the Patrol Commander will allow non-participating vessels to transit the event area between races;

(iii) the minimal size of the zone; and

(iv) before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The

Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

**Collection of Information**

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

**Indian Tribal Governments**

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded under the Instruction that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (34)(h), of the Instruction, an ''Environmental Analysis Checklist'' and a ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 100**

Marine safety, Navigation (water), Reporting and recordkeeping requirements, and Waterways.

■ Accordingly, the Coast Guard temporarily amends 33 CFR part 100 as follows:

## PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233.

■ 2. Add a temporary § 100.35T–05–0789 to read as follows:

**§ 100.35T–05–0789 Special Local Regulation, Cape Fear Dragon Boat Festival.**

(a) *Regulated area.* All waters of the Cape Fear River, adjacent to Wilmington, North Carolina, approximately 0.5 nautical miles north of the Cape Fear Memorial Bridge, starting from position latitude 34°14′24″ N, longitude 77°57′08″ W thence south along the east bank of the river to latitude 34°14′00″ N, longitude 77°56′58″ W, thence west to latitude 34°14′00″ N, longitude 77°57′05″ W, thence north along the west bank to latitude 34°14′24″ N, longitude 77°57′21″ W, thence east back to the point of origin. All coordinates reference Datum NAD 1983.

(b) *Definitions.* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Sector North Carolina.

(2) *Official Patrol* means any person or vessel assigned or approved by Commander, Coast Guard Sector North Carolina with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* includes all vessels participating in the ''Cape Fear Dragon Boat Festival'' under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Sector North Carolina.

(c) *Special local regulations.* (1) Except for persons or vessels authorized

by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must:

(i) Stop the vessel immediately when instructed to do so by the Official Patrol and then proceed as directed.

(ii) All persons and vessels shall comply with the instructions of the Official Patrol.

(iii) When authorized to transit the regulated area, all vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the race course.

(d) *Enforcement period.* This section will be effective from 8 a.m. to 6 p.m. on September 27, 2008.

Dated: August 4, 2008.

**F.M. Rosa, Jr.,**

*Rear Admiral, U.S. Coast Guard, District Five Commander.*

[FR Doc. E8–18789 Filed 8–13–08; 8:45 am]

**BILLING CODE 4910–15–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

### 37 CFR Parts 1 and 41

**[Docket No. PTO–C02008–0004]**

**RIN 0651–AC21**

## Revision of Patent Fees for Fiscal Year 2009

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Final rule.

**SUMMARY:** The United States Patent and Trademark Office (Office) is adjusting certain patent fee amounts for fiscal year 2009 to reflect fluctuations in the Consumer Price Index (CPI). The patent statute provides for the annual CPI adjustment of patent fees set by statute to recover the higher costs associated with doing business. In addition, the Office is correcting the addresses for maintenance fee payments and correspondence, and deposit account replenishments.

**DATES:** *Effective Date:* October 2, 2008.

**FOR FURTHER INFORMATION CONTACT:** Walter Schlueter by e-mail at *Walter.Schlueter@uspto.gov,* by telephone at (571) 272–6299, or by fax at (571) 273–6299.

**SUPPLEMENTARY INFORMATION:** The Office is adjusting certain patent fee amounts in accordance with the applicable provisions of title 35, United States Code, as amended by the Consolidated Appropriations Act (Pub. L. 108–447, 118 Stat. 2809 (2004)). In addition, this final rule changes the addresses for maintenance fee payments and correspondence, and deposit account replenishments. The addresses are being changed to reflect the current addresses that should be used.

**Background:**

*Statutory Provisions:* Patent fees are set by or under the authority provided in 35 U.S.C. 41, 119, 120, 132(b), 156, 157(a), 255, 302, 311, 376, section 532(a)(2) of the Uruguay Round Agreements Act (URAA) (Pub. L. 103–465, § 532(a)(2), 108 Stat. 4809, 4985 (1994)), and section 4506 of the American Inventors Protection Act of 1999 (AIPA) (Pub. L. 106–113, 113 Stat. 1501, 1501A–565 (1999)). For fees paid under 35 U.S.C. 41(a) and (b) and 132(b), independent inventors, small business concerns, and nonprofit organizations who meet the requirements of 35 U.S.C. 41(h)(1) are entitled to a fifty-percent reduction.

Section 41(d) of title 35, United States Code, authorizes the Director to establish fees for all other processing, services, or materials related to patents to recover the average cost of providing these services or materials, except for the fees for recording a document affecting title, for each photocopy, for each black and white copy of a patent, and for standard library service.

Section 41(f) of title 35, United States Code, provides that fee amounts established under 35 U.S.C. 41(a) and (b) may be adjusted on October 1, 1992, and every year thereafter, to reflect fluctuations in the CPI over the previous twelve months.

Section 41(g) of title 35, United States Code, provides that new fee amounts established by the Director under 35 U.S.C. 41 may take effect thirty days after notice in the **Federal Register** and the *Official Gazette of the United States Patent and Trademark Office.*

The fiscal year 2005 Consolidated Appropriations Act (section 801 of Division B) provided that 35 U.S.C. 41(a), (b), and (d) shall be administered in a manner that revises patent application fees (35 U.S.C. 41(a)) and patent maintenance fees (35 U.S.C. 41(b)), and provides for a separate filing fee (35 U.S.C. 41(a)), search fee (35 U.S.C. 41(d)(1)), and examination fee (35 U.S.C. 41(a)(3)) during fiscal years 2005 and 2006. *See* Public Law 108–447, 118 Stat. 2809, 2924–30 (2004). The patent and trademark fee provisions of the fiscal year 2005 Consolidated Appropriations Act were extended through September 30, 2008, by subsequent legislation. *See* Public Law 110–161, 121 Stat. 1844 (2007), Public Law 110–149, 121 Stat. 1819 (2007), Public Law 110–137, 121 Stat. 1454 (2007), Public Law 110–116, 121 Stat. 1295 (2007), Public Law 110–92, 121 Stat. 989 (2007), Public Law 110–5, 121 Stat. 8 (2007), Public Law 109–383, 120 Stat. 2678 (2006), Public Law 109–369, 120 Stat. 2642 (2006), and Public Law 109–289, 120 Stat. 1257 (2006). Legislation is pending before Congress which, if enacted, would extend the patent and trademark fee provisions of the fiscal year 2005 Consolidated Appropriations Act through fiscal year 2009 (through September 30, 2009). *See* S. 3182, 110th Cong. (2008).

*Fee Adjustment Level:* The patent statutory fee amounts established by 35 U.S.C. 41(a) and (b) are adjusted to reflect fluctuations occurring during the twelve-month period from October 1, 2007, through September 30, 2008, correspondingly, in the Consumer Price Index for All Urban Consumers (CPI–U). The Office of Management and Budget has advised that in calculating these fluctuations, the Office should use CPI–U data as determined by the Secretary of Labor. In accordance with previous fee-setting methodology, the Office bases this fee adjustment on the Administration's CPI–U for the twelve-month period ending September 30, 2008.

The Office published a notice proposing to adjust the patent fees charged under 35 U.S.C. 41(a), (b), and (d)(1) for fiscal year 2009 to reflect fluctuations in the CPI. *See Revision of Patent Fees for Fiscal Year 2009,* 73 FR 31655 (June 3, 2008), 1331 *Off. Gaz. Pat. Office* 97 (June 24, 2008) (proposed rule). While the proposed rule specified fee amounts based upon a projected CPI–U of 4.0 percent, the proposed rule indicated that the fee amounts adopted in a final rule may be based upon the actual fluctuations in the CPI–U as determined by the Secretary of Labor. See *Revision of Patent Fees for Fiscal Year 2009,* 73 FR at 31656, 1331–4 *Off. Gaz. Pat. Office* at 98. After the date the proposed rule was published, the projected CPI–U for the twelve-month period prior to the enactment of the fee amount adjustments has increased from 4.0 percent to 5.0 percent. Thus, this final rule adjusts the patent fees charged under 35 U.S.C. 41(a), (b), and (d)(1) by 5.0 percent based upon the current projected fluctuation in the CPI–U.

The fee amounts were rounded by applying standard arithmetic rules so that the amounts rounded will be convenient to the user. Fees for other than a small entity of $100 or more were rounded to the nearest $10. Fees of less than $100 were rounded to an even

number so that any comparable small entity fee will be a whole number.

*General Procedures:* Any fee amount that is paid on or after the effective date of the fee adjustment is subject to the new fees in effect. The amount of the fee to be paid will be determined by the time of filing. The time of filing will be determined either according to the date of receipt in the Office (37 CFR 1.6) or the date reflected on a proper Certificate of Mailing or Transmission, where such a certificate is authorized under 37 CFR 1.8. Use of a Certificate of Mailing or Transmission is not authorized for items that are specifically excluded from the provisions of 37 CFR 1.8. Items for which a Certificate of Mailing or Transmission under 37 CFR 1.8 is not authorized include, for example, filing of national and international applications for patents. *See* 37 CFR 1.8(a)(2).

Patent-related correspondence delivered by the ''Express Mail Post Office to Addressee'' service of the United States Postal Service (USPS) is considered filed or received in the Office on the date of deposit with the USPS. *See* 37 CFR 1.10(a)(1). The date of deposit with the USPS is shown by the ''date-in'' on the ''Express Mail'' mailing label or other official USPS notation.

To ensure clarity in the implementation of the new fee amounts and change of addresses, a discussion of specific sections is set forth below.

**Discussion of Specific Rules**

*37 CFR 1.1 Addresses for non-trademark correspondence with the United States Patent and Trademark Office.* Section 1.1, paragraph (d), is revised to change the maintenance fee payment and correspondence address.

*37 CFR 1.16 National application filing, search, and examination fees:* Section 1.16, paragraphs (a) through (e), (h) through (k), and (m) through (s), is revised to adjust fees established therein to reflect fluctuations in the CPI.

*37 CFR 1.17 Patent application and reexamination processing fees:* Section 1.17, paragraphs (a), (l), and (m), is revised to adjust fees established therein to reflect fluctuations in the CPI.

*37 CFR 1.18 Patent post allowance (including issue) fees:* Section 1.18, paragraphs (a) through (c), is revised to adjust fees established therein to reflect fluctuations in the CPI.

*37 CFR 1.20 Post issuance fees:* Section 1.20, paragraphs (c)(3), (c)(4), and (d) through (g), is revised to adjust fees established therein to reflect fluctuations in the CPI.

*37 CFR 1.25 Deposit accounts:* Section 1.25, paragraph (c)(3), is revised to change the deposit account replenishment address. In addition, paragraph (c)(4) is removed.

*37 CFR 1.492 National stage fees:* Section 1.492, paragraphs (a), (b)(3), (b)(4), (c)(2), (d) through (f), and (j), is revised to adjust fees established therein to reflect fluctuations in the CPI.

*37 CFR 41.20 Fees:* Section 41.20, paragraphs (b)(1) through (b)(3), is revised to adjust fees established therein to reflect fluctuations in the CPI.

*Alternative Fee Amounts if Legislation Extending the Patent and Trademark Fee Provisions of the Fiscal Year 2005 Consolidated Appropriations Act Is Not Enacted:* If legislation that would extend the patent and trademark fee provisions of the fiscal year 2005 Consolidated Appropriations Act into fiscal year 2009 is not enacted, patent fees under 35 U.S.C. 41(a), (b), and (d) will become the patent fees in effect in the absence of the fiscal year 2005 Consolidated Appropriations Act. In that event, the Office will publish a final rule adjusting the patent fees under 35 U.S.C. 41(a), (b), and (d) in effect in the absence of the fiscal year 2005 Consolidated Appropriations Act to reflect fluctuations in the Consumer Price Index (CPI–U). The following table (Table 1) sets out the fee amounts that would be published in a final rule in the event that legislation extending the patent and trademark fee provisions of the fiscal year 2005 Consolidated Appropriations Act into fiscal year 2009 is not enacted.

TABLE 1

| 37 CFR Sec. | Fee | Alternative fee amount (non-small entity) | Alternative fee amount (small entity) |
|---|---|---|---|
| 1.16(a) | Basic filing fee—utility application | 850.00 | 425.00 |
| 1.16(b) | Independent claims in excess of three | 94.00 | 47.00 |
| 1.16(d) | Multiple dependent claim | 330.00 | 165.00 |
| 1.16(f) | Basic filing fee—design application | 380.00 | 190.00 |
| 1.16(g) | Basic filing fee—plant application | 600.00 | 300.00 |
| 1.16(h) | Basic filing fee—reissue application | 850.00 | 425.00 |
| 1.16(i) | Independent claims in excess of three—reissue | 94.00 | 47.00 |
| 1.16(k) | Basic filing fee—provisional application | 170.00 | 85.00 |
| 1.17(a)(1) | Extension for response within first month | 120.00 | 60.00 |
| 1.17(a)(2) | Extension for response within second month | 480.00 | 240.00 |
| 1.17(a)(3) | Extension for response within third month | 1,100.00 | 550.00 |
| 1.17(a)(4) | Extension for response within fourth month | 1,720.00 | 860.00 |
| 1.17(a)(5) | Extension for response within fifth month | 2,340.00 | 1,170.00 |
| 1.17(m) | Petition to revive—unintentionally abandoned application | 1,480.00 | 740.00 |
| 1.18(a) | Issue fee—utility application | 1,480.00 | 740.00 |
| 1.18(b) | Issue fee—design application | 530.00 | 265.00 |
| 1.18(c) | Issue fee—plant application | 710.00 | 355.00 |
| 1.20(e) | Maintenance fee—due at 3.5 years | 1,020.00 | 510.00 |
| 1.20(f) | Maintenance fee—due at 7.5 years | 2,320.00 | 1,160.00 |
| 1.20(g) | Maintenance fee—due at 11.5 years | 3,580.00 | 1,790.00 |
| 1.492(a)(1) | IPEA—U.S. | 810.00 | 405.00 |
| 1.492(a)(2) | ISA—U.S. | 850.00 | 425.00 |
| 1.492(a)(3) | USPTO not ISA or IPEA | 1,200.00 | 600.00 |
| 1.492(a)(5) | Filing with EPO or JPO search report | 1,030.00 | 515.00 |
| 1.492(b) | Independent claims in excess of three | 94.00 | 47.00 |
| 1.492(d) | Multiple dependent claim | 330.00 | 165.00 |
| 41.20(b)(1) | Notice of appeal | 370.00 | 185.00 |
| 41.20(b)(2) | Brief in support of an appeal | 370.00 | 185.00 |

TABLE 1—Continued

| 37 CFR Sec. | Fee | Alternative fee amount (non-small entity) | Alternative fee amount (small entity) |
|---|---|---|---|
| 41.20(b)(3) | Request for oral hearing | 330.00 | 165.00 |

*Response to Comments:* As discussed previously, the Office published a notice proposing to adjust the patent fees charged under 35 U.S.C. 41(a), (b), and (d)(1) for fiscal year 2009 to reflect fluctuations in the CPI. *See Revision of Patent Fees for Fiscal Year 2009,* 73 FR 31655 *et seq.*, 1331–4 *Off. Gaz. Pat. Office* 97 *et seq.* The Office received one comment (from an individual) in response to this notice. The comment stated that small entity fees should not be increased, but rather should be reduced.

The small entity reduction amounts are provided by 35 U.S.C. 41(h)(1) (''fees charged under [35 U.S.C. 41](a), (b) and (d)(1) shall be reduced by 50 percent with respect to their application to any small business concern as defined under section 3 of the Small Business Act, and to any independent inventor or nonprofit organization as defined in regulations issued by the Director'') and 41(h)(3) (''[t]he fee charged under [35 U.S.C. 41](a)(l)(A) shall be reduced by 75 percent with respect to its application to any entity to which [35 U.S.C. 41(h)(1)] applies, if the application is filed by electronic means as prescribed by the Director''). The Office has no authority to change (increase or reduce) the percentage by which the patent fees charged under 35 U.S.C. 41(a), (b), and (d)(1) are reduced for small entities. The Office also has no authority to adjust the patent fee amounts specified in [35 U.S.C. 41](a), (b) and (d)(1) to reflect fluctuations in the CPI (which is necessary to recover the higher costs associated with doing business) only with respect to non-small entities.

**Rulemaking Considerations**

*A. Final Regulatory Flexibility Analysis*

1. Description of the reasons that action by the Office is being considered: The Office is adjusting the patent fees set under 35 U.S.C. 41(a) and (b) to ensure proper funding for effective Office operations. The patent fee CPI adjustment is a routine adjustment that has generally occurred on an annual basis to recover the higher costs of the Office's operations that occur due to the increase in the price of products and services. The lack of proper funding for effective Office operations would result in a significant increase in patent pendency levels.

2. Succinct statement of the objectives of, and legal basis for, the final rule: The objective of the change is to adjust patent fees set under 35 U.S.C. 41(a) and (b) to recover the higher costs of Office operations. Patent fees are set by or under the authority provided in 35 U.S.C. 41, 119, 120, 132(b), 156, 157(a), 255, 302, 311, 376, section 532(a)(2) of the URAA, and 4506 of the AIPA. 35 U.S.C. 41(f) provides that fees established under 35 U.S.C. 41(a) and (b) may be adjusted every year to reflect fluctuations in the CPI over the previous twelve months.

3. Description and estimate of the number of affected small entities: The Small Business Administration (SBA) small business size standards applicable to most analyses conducted to comply with the Regulatory Flexibility Act are set forth in 13 CFR 121.201. These regulations generally define small businesses as those with fewer than a maximum number of employees or less than a specified level of annual receipts for the entity's industrial sector or North American Industry Classification System (NAICS) code. The Office, however, has formally adopted an alternate size standard as the size standard for the purpose of conducting an analysis or making a certification under the Regulatory Flexibility Act for patent-related regulations. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations,* 71 FR 67109 (Nov. 20, 2006), 1313 *Off. Gaz. Pat. Office* 60 (Dec. 12, 2006). This alternate small business size standard is the previously established size standard that identifies the criteria entities must meet to be entitled to pay reduced patent fees. *See* 13 CFR 121.802. If patent applicants identify themselves on the patent application as qualifying for reduced patent fees, the Office captures this data in the Patent Application Location and Monitoring (PALM) database system, which tracks information on each patent application submitted to the Office.

Unlike the SBA small business size standards set forth in 13 CFR 121.201, this size standard is not industry-specific. Specifically, the Office's definition of small business concern for Regulatory Flexibility Act purposes is a business or other concern that: (1) Meets the SBA's definition of a ''business concern or concern'' set forth in 13 CFR 121.105; and (2) meets the size standards set forth in 13 CFR 121.802 for the purpose of paying reduced patent fees, namely an entity: (a) Whose number of employees, including affiliates, does not exceed 500 persons; and (b) which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this definition. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations,* 71 FR at 67112, 1313 *Off. Gaz. Pat. Office* at 63.

The changes in this final rule will apply to any small entity that files a patent application, or has a pending patent application or unexpired patent. The changes in this rule specifically apply when an applicant or patentee pays an application filing or national stage entry fee, search fee, examination fee, excess or multiple dependent claim fee, application size fee, extension of time fee, notice of appeal fee, appeal brief fee, request for an oral hearing fee, disclaimer fee, petition to revive fee, issue fee, or patent maintenance fee. The following table (Table 2) indicates the applicable fee, the number of small entity payments of the fee received by the Office in fiscal year 2007 (number of small entities who paid the applicable fee in fiscal year 2007), the current small entity fee amount, the new small entity fee amount, and the net amount of the small entity fee adjustment.

TABLE 2

| Fee | Fiscal year 2007 small entity payments | Former fee amount | Adjusted fee amount | Fee adjustment |
|---|---|---|---|---|
| Basic filing fee—utility application—electronic filing | 41,519 | 75.00 | 82.00 | 7.00 |
| Basic filing fee—utility application (on or after December 8, 2004) | 45,832 | 155.00 | 165.00 | 10.00 |
| Basic filing fee—utility application (before December 8, 2004) | 66 | 405.00 | 425.00 | 20.00 |
| Basic filing fee—design application (on or after December 8, 2004) | 12,846 | 105.00 | 110.00 | 5.00 |
| Basic filing fee—design application (before December 8, 2004) | 11 | 180.00 | 190.00 | 10.00 |
| Basic filing fee—plant application (on or after December 8, 2004) | 327 | 105.00 | 110.00 | 5.00 |
| Basic filing fee—plant application (before December 8, 2004) | 0 | 285.00 | 300.00 | 15.00 |
| Basic filing fee—provisional application | 83,712 | 105.00 | 110.00 | 5.00 |
| Basic filing fee—reissue application (on or after December 8, 2004) | 181 | 155.00 | 165.00 | 10.00 |
| Basic filing fee—reissue application (before December 8, 2004) | 1 | 405.00 | 425.00 | 20.00 |
| Independent claims in excess of three | 26,418 | 105.00 | 110.00 | 5.00 |
| Claims in excess of 20 | 41,100 | 25.00 | 26.00 | 1.00 |
| Multiple dependent claim | 2,503 | 185.00 | 195.00 | 10.00 |
| Search fee—utility application (on or after December 8, 2004) | 86,469 | 255.00 | 270.00 | 15.00 |
| Search fee—plant application (on or after December 8, 2004) | 326 | 155.00 | 165.00 | 10.00 |
| Search fee—reissue application (on or after December 8, 2004) | 180 | 255.00 | 270.00 | 15.00 |
| Examination fee—utility application (on or after December 8, 2004) | 86,658 | 105.00 | 110.00 | 5.00 |
| Examination fee—design application (on or after December 8, 2004) | 12,615 | 65.00 | 70.00 | 5.00 |
| Examination fee—plant application (on or after December 8, 2004) | 327 | 80.00 | 85.00 | 5.00 |
| Examination fee—reissue application (on or after December 8, 2004) | 191 | 310.00 | 325.00 | 15.00 |
| Application size fee greater than 100 pages | 5,469 | 130.00 | 135.00 | 5.00 |
| Extension for response within first month | 30,722 | 60.00 | 65.00 | 5.00 |
| Extension for response within second month | 17,339 | 230.00 | 245.00 | 15.00 |
| Extension for response within third month | 23,818 | 525.00 | 555.00 | 30.00 |
| Extension for response within fourth month | 2,277 | 820.00 | 865.00 | 45.00 |
| Extension for response within fifth month | 2,700 | 1,115.00 | 1,175.00 | 60.00 |
| Petition to revive—unavoidably abandoned application | 174 | 255.00 | 270.00 | 15.00 |
| Petition to revive—unintentionally abandoned application | 3,271 | 770.00 | 810.00 | 40.00 |
| Issue fee—utility application | 33,718 | 720.00 | 755.00 | 35.00 |
| Issue fee—design application | 10,398 | 410.00 | 430.00 | 20.00 |
| Issue fee—plant application | 298 | 565.00 | 595.00 | 30.00 |
| Reexamination independent claims in excess of three | 37 | 105.00 | 110.00 | 5.00 |
| Reexamination claims in excess of 20 | 45 | 25.00 | 26.00 | 1.00 |
| Statutory disclaimer | 6,248 | 65.00 | 70.00 | 5.00 |
| Maintenance fee—due at 3.5 years | 32,577 | 465.00 | 490.00 | 25.00 |
| Maintenance fee—due at 7.5 years | 20,981 | 1,180.00 | 1,240.00 | 60.00 |
| Maintenance fee—due at 11.5 years | 8,130 | 1,955.00 | 2,055.00 | 100.00 |
| Filing of PCT application—USPTO ISA—national stage | 11,807 | 155.00 | 165.00 | 10.00 |
| National stage search fee—search report to USPTO | 8,440 | 205.00 | 215.00 | 10.00 |
| National stage search fee—all other situations | 1,029 | 255.00 | 270.00 | 15.00 |
| National stage examination fee—all other situations | 11,262 | 105.00 | 110.00 | 5.00 |
| Independent claims in excess of three | 3,272 | 105.00 | 110.00 | 5.00 |
| Claims in excess of 20 | 5,913 | 25.00 | 26.00 | 1.00 |
| Multiple dependent claim | 1,178 | 185.00 | 195.00 | 10.00 |
| Application size fee greater than 100 pages | 573 | 130.00 | 135.00 | 5.00 |
| Notice of appeal | 5,978 | 255.00 | 270.00 | 15.00 |
| Brief in support of an appeal | 2,640 | 255.00 | 270.00 | 15.00 |
| Request for oral hearing | 233 | 515.00 | 540.00 | 25.00 |

The Office has also been advised that a number of small entity applicants and patentees do not claim small entity status for various reasons. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations,* 71 FR at 67110, 1313 *Off. Gaz. Pat. Office* at 61. Therefore, the Office has also considered all other entities paying patent fees as well. The following table (Table 3) indicates the applicable fee, the number of non-small entity payments of the fee received by the

Office in fiscal year 2007 (number of non-small entities who paid the applicable fee in fiscal year 2007), the current non-small entity fee amount, the revised non-small entity fee amount, and the net amount of the non-small entity fee adjustment.

TABLE 3

| Fee | Fiscal year 2007 non-small entity payments | Former fee amount | Adjusted fee amount | Fee adjustment |
|---|---|---|---|---|
| Basic filing fee—utility application (on or after December 8, 2004) | 209,577 | 310.00 | 330.00 | 20.00 |
| Basic filing fee—utility application (before December 8, 2004) | 311 | 810.00 | 850.00 | 40.00 |
| Basic filing fee—design application (on or after December 8, 2004) | 13,400 | 210.00 | 220.00 | 10.00 |
| Basic filing fee—design application (before December 8, 2004) | 72 | 360.00 | 380.00 | 20.00 |
| Basic filing fee—plant application (on or after December 8, 2004) | 680 | 210.00 | 220.00 | 10.00 |
| Basic filing fee—plant application (before December 8, 2004) | 0 | 570.00 | 600.00 | 30.00 |
| Basic filing fee—provisional application | 47,925 | 210.00 | 220.00 | 10.00 |
| Basic filing fee—reissue application (on or after December 8, 2004) | 689 | 310.00 | 330.00 | 20.00 |
| Basic filing fee—reissue application (before December 8, 2004) | 1 | 810.00 | 850.00 | 40.00 |
| Independent claims in excess of three | 77,135 | 210.00 | 220.00 | 10.00 |
| Claims in excess of 20 | 102,973 | 50.00 | 52.00 | 2.00 |
| Multiple dependent claim | 5,944 | 370.00 | 390.00 | 20.00 |
| Search fee—utility application (on or after December 8, 2004) | 209,135 | 510.00 | 540.00 | 30.00 |
| Search fee—plant application (on or after December 8, 2004) | 681 | 310.00 | 330.00 | 20.00 |
| Search fee—reissue application (on or after December 8, 2004) | 688 | 510.00 | 540.00 | 30.00 |
| Examination fee—utility application (on or after December 8, 2004) | 209,465 | 210.00 | 220.00 | 10.00 |
| Examination fee—design application (on or after December 8, 2004) | 13,261 | 130.00 | 140.00 | 10.00 |
| Examination fee—plant application (on or after December 8, 2004) | 681 | 160.00 | 170.00 | 10.00 |
| Examination fee—reissue application (on or after December 8, 2004) | 707 | 620.00 | 650.00 | 30.00 |
| Application size fee greater than 100 pages | 11,257 | 260.00 | 270.00 | 10.00 |
| Extension for response within first month | 88,684 | 120.00 | 130.00 | 10.00 |
| Extension for response within second month | 42,308 | 460.00 | 490.00 | 30.00 |
| Extension for response within third month | 41,489 | 1,050.00 | 1,110.00 | 60.00 |
| Extension for response within fourth month | 3,105 | 1,640.00 | 1,730.00 | 90.00 |
| Extension for response within fifth month | 3,482 | 2,230.00 | 2,350.00 | 120.00 |
| Petition to revive—unavoidably abandoned application | 127 | 510.00 | 540.00 | 30.00 |
| Petition to revive—unintentionally abandoned application | 4,180 | 1,540.00 | 1,620.00 | 80.00 |
| Issue fee—utility application | 122,251 | 1,440.00 | 1,510.00 | 70.00 |
| Issue fee—design application | 12,433 | 820.00 | 860.00 | 40.00 |
| Issue fee—plant application | 673 | 1,130.00 | 1,190.00 | 60.00 |
| Reexamination independent claims in excess of three | 132 | 210.00 | 220.00 | 10.00 |
| Reexamination claims in excess of 20 | 151 | 50.00 | 52.00 | 2.00 |
| Statutory disclaimer | 21,218 | 130.00 | 140.00 | 10.00 |
| Maintenance fee—due at 3.5 years | 125,653 | 930.00 | 980.00 | 50.00 |
| Maintenance fee—due at 7.5 years | 88,487 | 2,360.00 | 2,480.00 | 120.00 |
| Maintenance fee—due at 11.5 years | 42,193 | 3,910.00 | 4,110.00 | 200.00 |
| Filing of PCT application—USPTO ISA—national stage | 41,842 | 310.00 | 330.00 | 20.00 |
| National stage search fee—search report to USPTO | 38,457 | 410.00 | 430.00 | 20.00 |
| National stage search fee—all other situations | 2,429 | 510.00 | 540.00 | 30.00 |
| National stage examination fee—all other situations | 41,044 | 210.00 | 220.00 | 10.00 |
| Independent claims in excess of three | 9,367 | 210.00 | 220.00 | 10.00 |
| Claims in excess of 20 | 14,983 | 50.00 | 52.00 | 2.00 |
| Multiple dependent claim | 3,998 | 370.00 | 390.00 | 20.00 |
| Application size fee greater than 100 pages | 2,102 | 260.00 | 270.00 | 10.00 |
| Notice of appeal | 21,646 | 510.00 | 540.00 | 30.00 |
| Brief in support of an appeal | 11,950 | 510.00 | 540.00 | 30.00 |
| Request for oral hearing | 736 | 1,030.00 | 1,080.00 | 50.00 |

4. Description of the reporting, recordkeeping and other compliance requirements of the final rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional

skills necessary for preparation of the report or record: This rule does not require any reporting or recordkeeping or incorporate other compliance requirements. This rule only adjusts patent fees (as discussed previously) to reflect changes in the CPI.

5. Description of any significant alternatives to the final rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities: The alternative of not adjusting patent fees would have a lesser economic impact on small entities, but would not accomplish the stated objectives of applicable statutes. The Office is adjusting the patent fee amounts to ensure proper funding for effective Office operations. The patent fee CPI adjustment is a routine adjustment that has generally occurred on an annual basis to recover the higher costs of the Office's operations that occur due to the increase in the price of products and services. The lack of proper funding for effective Office operations would result in a significant increase in patent pendency levels.

6. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the final rules: The Office is the sole agency of the United States Government responsible for administering the provisions of title 35, United States Code, pertaining to examination and granting patents. Therefore, no other federal, state, or local entity shares jurisdiction over the examination and granting patents.

Other countries, however, have their own patent laws, and an entity desiring a patent in a particular country must make an application for patent in that country, in accordance with the applicable law. Although the potential for overlap exists internationally, this cannot be avoided except by treaty (such as the Paris Convention for the Protection of Industrial Property, or the Patent Cooperation Treaty (PCT)).

Nevertheless, the Office believes that there are no other duplicative or overlapping rules.

*B. Executive Order 13132 (Federalism)*

This final rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

*C. Executive Order 12866 (Regulatory Planning and Review)*

This rulemaking has been determined to be significant for purposes of Executive Order 12866 (Sept. 30, 1993), as amended by Executive Order 13258 (Feb. 26, 2002) and Executive Order 13422 (Jan. 18, 2007).

*D. Executive Order 13175 (Tribal Consultation)*

This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

*E. Executive Order 13211 (Energy Effects)*

This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

*F. Executive Order 12988 (Civil Justice Reform)*

This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

*G. Executive Order 13045 (Protection of Children)*

This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

*H. Executive Order 12630 (Taking of Private Property)*

This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

*I. Congressional Review Act*

Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), the United States Patent and Trademark Office has submitted a report containing the final rule and other required information to the United States Senate, the United States House of Representatives and the Comptroller General of the Government Accountability Office. The changes in this final rule will not result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this final rule is not a ''major rule'' as defined in 5 U.S.C. 804(2).

*J. Unfunded Mandates Reform Act of 1995*

The changes in this final rule do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

*K. National Environmental Policy Act*

This rulemaking will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

*L. National Technology Transfer and Advancement Act*

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are inapplicable because this rule making does not contain provisions which involve the use of technical standards.

*M. Paperwork Reduction Act*

This rule involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collections of information involved in this rule have been reviewed and approved by OMB under OMB control numbers 0651–0016, 0651–0021, 0651–0031, 0651–0032, and 0651–0033. The Office is not resubmitting information collection packages to OMB for its review and approval at this time but will update the fee amounts for existing information collection requirements associated with the information collections under OMB control numbers 0651–0016, 0651–0021, 0651–0031, 0651–0032, and 0651–0033. The Office will submit fee revision changes for OMB control numbers 0651–0016, 0651–0021, 0651–0031, 0651–0032, and 0651–0033 at the time these collections are resubmitted to OMB for renewal.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

**List of Subjects**

*37 CFR Part 1*

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

*37 CFR Part 41*

Administrative practice and procedure, Inventions and patents, Lawyers.

■ For the reasons set forth in the preamble, 37 CFR parts 1 and 41 are amended as follows:

## PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2).

■ 2. Section 1.1 is amended by revising paragraph (d) to read as follows:

**§ 1.1 Addresses for non-trademark correspondence with the United States Patent and Trademark Office.**

* * * * *

(d) Payments of maintenance fees in patents not submitted electronically over the Internet, and correspondence related to maintenance fees may be addressed to: Director of the United States Patent and Trademark Office, Attn: Maintenance Fee, 2051 Jamieson Avenue, Suite 300, Alexandria, Virginia 22314.

* * * * *

■ 3. Part 1 of 37 CFR is amended immediately after the undesignated center heading ''Fees and Payment of Money'' to include the following authority citation:

**Authority:** Secs. 1.16 to 1.22 also issued under 35 U.S.C. 41, 111, 119, 120, 132(b), 156, 157, 255, 302, and 311, and Public Laws 103–465, and 106–113.

■ 4. Section 1.16 is amended by revising paragraphs (a) through (e), (h) through (k), and (m) through (s) to read as follows:

**§ 1.16 National application filing, search, and examination fees.**

(a) Basic fee for filing each application under 35 U.S.C. 111 for an original patent, except design, plant, or provisional applications:

(1) For an application filed on or after December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) if the application is submitted in compliance with the Office electronic filing system (§ 1.27(b)(2)) ..... | $82.00 |
| By a small entity (§ 1.27(a)) ..... | $165.00 |
| By other than a small entity ..... | $330.00 |

(2) For an application filed before December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $425.00 |
| By other than a small entity ..... | $850.00 |

(b) Basic fee for filing each application for an original design patent:

(1) For an application filed on or after December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(2) For an application filed before December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $190.00 |
| By other than a small entity ..... | $380.00 |

(c) Basic fee for filing each application for an original plant patent:

(1) For an application filed on or after December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(2) For an application filed before December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $300.00 |
| By other than a small entity ..... | $600.00 |

(d) Basic fee for filing each provisional application:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(e) Basic fee for filing each application for the reissue of a patent:

(1) For an application filed on or after December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $165.00 |
| By other than a small entity ..... | $330.00 |

(2) For an application filed before December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $425.00 |
| By other than a small entity ..... | $850.00 |

* * * * *

(h) In addition to the basic filing fee in an application, other than a provisional application, for filing or later presentation at any other time of each claim in independent form in excess of 3:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(i) In addition to the basic filing fee in an application, other than a provisional application, for filing or later presentation at any other time of each claim (whether dependent or independent) in excess of 20 (note that § 1.75(c) indicates how multiple dependent claims are considered for fee calculation purposes):

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $26.00 |
| By other than a small entity ..... | $52.00 |

(j) In addition to the basic filing fee in an application, other than a provisional application, that contains, or is amended to contain, a multiple dependent claim, per application:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $195.00 |
| By other than a small entity ..... | $390.00 |

(k) Search fee for each application filed under 35 U.S.C. 111 on or after December 8, 2004, for an original patent, except design, plant, or provisional applications:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $270.00 |
| By other than a small entity ..... | $540.00 |

* * * * *

(m) Search fee for each application filed on or after December 8, 2004, for an original plant patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $165.00 |
| By other than a small entity ..... | $330.00 |

(n) Search fee for each application filed on or after December 8, 2004, for the reissue of a patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $270.00 |
| By other than a small entity ..... | $540.00 |

(o) Examination fee for each application filed under 35 U.S.C. 111 on or after December 8, 2004, for an original patent, except design, plant, or provisional applications:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(p) Examination fee for each application filed on or after December 8, 2004, for an original design patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $70.00 |
| By other than a small entity ..... | $140.00 |

(q) Examination fee for each application filed on or after December 8, 2004, for an original plant patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $85.00 |
| By other than a small entity ..... | $170.00 |

(r) Examination fee for each application filed on or after December 8, 2004, for the reissue of a patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $325.00 |
| By other than a small entity ..... | $650.00 |

(s) Application size fee for any application under 35 U.S.C. 111 filed on or after December 8, 2004, the specification and drawings of which exceed 100 sheets of paper, for each additional 50 sheets or fraction thereof:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $135.00 |
| By other than a small entity ..... | $270.00 |

* * * * *

■ 5. Section 1.17 is amended by revising paragraphs (a), (l), and (m) to read as follows:

**§ 1.17 Patent application and reexamination processing fees.**

(a) Extension fees pursuant to § 1.136(a):

(1) For reply within first month:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $65.00 |
| By other than a small entity ..... | $130.00 |

(2) For reply within second month:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $245.00 |
| By other than a small entity ..... | $490.00 |

(3) For reply within third month:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $555.00 |
| By other than a small entity ..... | $1,110.00 |

(4) For reply within fourth month:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $865.00 |
| By other than a small entity ..... | $1,730.00 |

(5) For reply within fifth month:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $1,175.00 |
| By other than a small entity ..... | $2,350.00 |

* * * * *

(l) For filing a petition for the revival of an unavoidably abandoned application under 35 U.S.C. 111, 133, 364, or 371, for the unavoidably delayed payment of the issue fee under 35 U.S.C. 151, or for the revival of an unavoidably terminated reexamination proceeding under 35 U.S.C. 133 (§ 1.137(a)):

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $270.00 |
| By other than a small entity ..... | $540.00 |

(m) For filing a petition for the revival of an unintentionally abandoned application, for the unintentionally delayed payment of the fee for issuing a patent, or for the revival of an unintentionally terminated reexamination proceeding under 35 U.S.C. 41(a)(7) (§ 1.137(b)):

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $810.00 |
| By other than a small entity ..... | $1,620.00 |

* * * * *

■ 6. Section 1.18 is amended by revising paragraphs (a) through (c) to read as follows:

**§ 1.18 Patent post allowance (including issue) fees.**

(a) Issue fee for issuing each original patent, except a design or plant patent, or for issuing each reissue patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $755.00 |
| By other than a small entity ..... | $1,510.00 |

(b) Issue fee for issuing an original design patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $430.00 |
| By other than a small entity ..... | $860.00 |

(c) Issue fee for issuing an original plant patent:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $595.00 |
| By other than a small entity ..... | $1,190.00 |

* * * * *

■ 7. Section 1.20 is amended by revising paragraphs (c)(3), (c)(4), and (d) through (g) to read as follows:

**§ 1.20 Post issuance fees.**

* * * * *

(c) * * *

(3) For filing with a request for reexamination or later presentation at any other time of each claim in independent form in excess of 3 and also in excess of the number of claims in independent form in the patent under reexamination:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(4) For filing with a request for reexamination or later presentation at any other time of each claim (whether dependent or independent) in excess of 20 and also in excess of the number of claims in the patent under reexamination (note that § 1.75(c) indicates how multiple dependent claims are considered for fee calculation purposes):

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $26.00 |
| By other than a small entity ..... | $52.00 |

* * * * *

(d) For filing each statutory disclaimer (§ 1.321):

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $70.00 |
| By other than a small entity ..... | $140.00 |

(e) For maintaining an original or reissue patent, except a design or plant patent, based on an application filed on or after December 12, 1980, in force beyond four years, the fee being due by three years and six months after the original grant:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $490.00 |
| By other than a small entity ..... | $980.00 |

(f) For maintaining an original or reissue patent, except a design or plant patent, based on an application filed on or after December 12, 1980, in force beyond eight years, the fee being due by seven years and six months after the original grant:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $1,240.00 |
| By other than a small entity ..... | $2,480.00 |

(g) For maintaining an original or reissue patent, except a design or plant patent, based on an application filed on or after December 12, 1980, in force beyond twelve years, the fee being due by eleven years and six months after the original grant:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $2,055.00 |
| By other than a small entity ..... | $4,110.00 |

* * * * *

■ 8. Section 1.25 is amended by removing paragraph (c)(4) and revising paragraph (c)(3) to read as follows:

**§ 1.25 Deposit accounts.**

* * * * *

(c) * * *

(3) A payment to replenish a deposit account may be addressed to: Director of the United States Patent and Trademark Office, Attn: Deposit Accounts, 2051 Jamieson Avenue, Suite 300, Alexandria, Virginia 22314.

■ 9. Section 1.492 is amended by revising paragraphs (a), (b)(3), (b)(4), (c)(2), (d) through (f) and (j) to read as follows:

**§ 1.492 National stage fees.**

* * * * *

(a) The basic national fee for an international application entering the national stage under 35 U.S.C. 371 if the basic national fee was not paid before December 8, 2004:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $165.00 |
| By other than a small entity ..... | $330.00 |

(b) * * *

(3) If an international search report on the international application has been prepared by an International Searching Authority other than the United States International Searching Authority and is provided, or has been previously communicated by the International Bureau, to the Office:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $215.00 |
| By other than a small entity ..... | $430.00 |

(4) In all situations not provided for in paragraphs (b)(1), (b)(2), or (b)(3) of this section:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $270.00 |
| By other than a small entity ..... | $540.00 |

(c) * * *

(2) In all situations not provided for in paragraph (c)(1) of this section:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(d) In addition to the basic national fee, for filing or on later presentation at any other time of each claim in independent form in excess of 3:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $110.00 |
| By other than a small entity ..... | $220.00 |

(e) In addition to the basic national fee, for filing or on later presentation at any other time of each claim (whether dependent or independent) in excess of 20 (note that § 1.75(c) indicates how multiple dependent claims are considered for fee calculation purposes):

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $26.00 |
| By other than a small entity ..... | $52.00 |

(f) In addition to the basic national fee, if the application contains, or is amended to contain, a multiple dependent claim, per application:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $195.00 |
| By other than a small entity ..... | $390.00 |

* * * * *

(j) Application size fee for any international application for which the basic national fee was not paid before December 8, 2004, the specification and drawings of which exceed 100 sheets of

paper, for each additional 50 sheets or fraction thereof:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $135.00 |
| By other than a small entity ..... | $270.00 |

## PART 41—PRACTICE BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

■ 10. The authority citation for 37 CFR part 41 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2), 3(a)(2)(A), 21, 23, 32, 41, 134, 135.

■ 11. Section 41.20 is amended by revising paragraph (b) to read as follows:

**§ 41.20 Fees.**

* * * * *

(b) *Appeal fees.* (1) For filing a notice of appeal from the examiner to the Board:

| | |
|---|---|
| By a small entity (§ 1.27(a) of this title) ..... | $270.00 |
| By other than a small entity ..... | $540.00 |

(2) In addition to the fee for filing a notice of appeal, for filing a brief in support of an appeal:

| | |
|---|---|
| By a small entity (§ 1.27(a) of this title) ..... | $270.00 |
| By other than a small entity ..... | $540.00 |

(3) For filing a request for an oral hearing before the Board in an appeal under 35 U.S.C. 134:

| | |
|---|---|
| By a small entity (§ 1.27(a)) ..... | $540.00 |
| By other than a small entity ..... | $1,080.00 |

Dated: August 8, 2008.

**Margaret J. A. Peterlin,**

*Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.*

[FR Doc. E8–18822 Filed 8–13–08; 8:45 am]

**BILLING CODE 3510–16–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R09–OAR–2006–0571; FRL–8703–3]**

## Approval and Promulgation of Implementation Plans for Arizona; Maricopa County PM–10 Nonattainment Area; Serious Area Plan for Attainment of the 24-Hour and Annual PM–10 Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action under the Clean Air Act (CAA) to approve the Best Available Control Measure (BACM) and the Most Stringent Measure (MSM) demonstrations in the serious area particulate matter (PM–10) plan for the Maricopa County portion of the metropolitan Phoenix (Arizona) nonattainment area (Maricopa County area). EPA is also confirming that it appropriately granted Arizona's request to extend the attainment deadline from 2001 to 2006. EPA originally approved these demonstrations and granted the extension request on July 25, 2002. Thereafter EPA's action was challenged in the U.S. Court of Appeals for the Ninth Circuit. In response to the Court's remand, EPA reassessed the BACM demonstration for the significant source categories of on-road motor vehicles and nonroad engines and equipment exhaust, specifically regarding whether or not California Air Resources Board (CARB) diesel is a BACM and/or MSM. As a result of this reassessment, EPA in 2006 again approved the BACM and MSM demonstrations in the plan and granted the request for an attainment date extension. In light of its 2007 finding that the Maricopa County area failed to attain the 24-hour PM–10 National Ambient Air Quality Standard (NAAQS) by December 31, 2006, EPA has again reassessed the BACM and MSM demonstrations and is again approving these demonstrations.

**DATES:** *Effective Date:* This rule is effective on September 15, 2008.

**ADDRESSES:** EPA has established docket number EPA–R09–OAR–0091 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location, *e.g.*, copyrighted material, and some may not be publicly available in either location, *e.g.*, confidential business information. To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Carol Weisner, EPA Region IX, (415) 947–4107, *weisner.carol@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

### I. Summary of Proposed Action

On June 8, 2007, EPA proposed to re-approve the BACM and MSM demonstrations in Arizona's serious area PM–10 plan for the Maricopa County area. EPA also proposed to confirm that it appropriately granted Arizona's request for an extension of the area's attainment deadline from December 31, 2001 to December 31, 2006. 72 FR 31778. EPA originally approved the BACM and MSM demonstrations and granted the attainment date extension in 2002.[1] EPA's 2002 action was subsequently challenged in the U.S. Court of Appeals for the Ninth Circuit. On May 10, 2004, the Court issued its opinion which upheld EPA's final approval in part but remanded to EPA the issue of whether CARB diesel must be included in the serious area plan as a BACM and a MSM. See *Vigil* v. *Leavitt*, 366 F.3d 1025, amended at 381 F.3d 826 (9th Cir. 2004).

In response to the Ninth Circuit's remand, EPA re-examined the feasibility of CARB diesel for both the on-road motor vehicle exhaust and nonroad engines and equipment exhaust significant source categories. On August 3, 2006, EPA again approved the BACM and MSM demonstrations in the MAG plan for these significant source categories without CARB diesel and granted the State's request to extend the attainment deadline from 2001 to 2006. 71 FR 43979. In this final action, EPA concluded that implementation of CARB diesel was not feasible for (1) on-road motor vehicle exhaust because Arizona would not be able to make a ''necessity'' showing for CARB diesel and thus, would not be able to obtain a waiver of federal preemption under CAA section 211(c)(4)(C)(i) in light of EPA's prior approval of the PM–10 attainment demonstration that did not rely on reductions associated with the use of CARB diesel, and (2) nonroad engines and equipment exhaust because of the uncertainties with fuel availability, storage and segregation and

[1] On July 25, 2002, EPA approved multiple documents submitted to EPA by Arizona for the Maricopa County area as meeting the CAA requirements for serious PM–10 nonattainment areas for the 24-hour and annual PM–10 national ambient air quality standards (NAAQS). Among these documents is the ''Revised MAG 1999 Serious Area Particulate Plan for PM–10 for the Maricopa County Nonattainment Area,'' February 2000 (MAG plan) that includes the BACM demonstrations for all significant source categories (except agriculture) for both the 24-hour and annual PM–10 standards and the State's request and supporting documentation, including the most stringent measure analysis (except for agriculture) for an attainment date extension for both standards. EPA's July 25, 2002 final action included approval of these elements of the MAG plan. For a detailed discussion of the MAG plan and the serious area PM–10 requirements, please see EPA's proposed and final approval actions at 65 FR 19964 (April 13, 2000), 66 FR 50252 (October 2, 2001) and 67 FR 48718 (July 25, 2002).

Note that, effective December 18, 2006, EPA revoked the annual PM–10 standard. 71 FR 61144 (October 17, 2006). References to the annual standard in this final rule are for historical purposes only. EPA is not taking any regulatory action with regard to this former standard.

concerns about program effectiveness due to owners and operators fueling outside the Maricopa County area.

On June 6, 2007, EPA issued a finding that the Maricopa area failed to attain the 24-hour PM–10 NAAQS by December 31, 2006. 72 FR 31183. As a result, EPA can no longer rely on its August 3, 2006 conclusion that CARB diesel is not necessary for the attainment of the PM–10 NAAQS. Thus, EPA reassessed the BACM demonstration for the on-road motor vehicle exhaust source category in light of the new provisions in the Energy Policy Act of 2005 (EPAct) which we had mentioned but not addressed in the August 3, 2006 approval because, as noted earlier, we had concluded that we could not approve CARB diesel into the Arizona State implementation plan (SIP) under CAA section 211(c)(4)(C)(i). EPA concluded that it could not approve a CAA section 211(c)(4)(C)(i) waiver for Arizona for CARB diesel because the effect of such an approval would unlawfully increase the total number of fuels approved under section 211(c)(4)(C) as of September 1, 2004. Therefore, EPA again proposed to approve the BACM demonstration for the on-road motor vehicle exhaust source category in the MAG plan without CARB diesel.

Because our August 3, 2006 approval of the BACM demonstration for nonroad engines and equipment exhaust relied to some extent on our conclusion with respect to on-road motor vehicle exhaust, we also proposed again to find that CARB diesel is not required as a BACM for the nonroad category because of the uncertainties with fuel availability, storage and segregation and concerns about program effectiveness due to owners and operators fueling outside the Maricopa County area.

Finally, because the December 31, 2006 attainment deadline has passed since EPA granted the State's request for an attainment date extension in its August 3, 2006 action, the extension request is moot. However, if CARB diesel had been required as a MSM in order for EPA to grant the extension request, the State would now be required to implement it absent the requisite showing under CAA section 110(l). Therefore EPA again proposed to approve the MSM demonstration in the MAG plan without CARB diesel. We also proposed to confirm that we had appropriately granted the State's request for an attainment date extension in our 2002 and 2006 actions.

## II. Public Comments and EPA Responses

EPA received one comment letter, from Joy E. Herr-Cardillo, Senior Staff Attorney, Arizona Center for Law in the Public Interest (ACLPI), on behalf of Phoenix area residents Robin Silver, Sandra L. Bahr and David Matusow. EPA appreciates the time and effort expended by the commenter in reviewing the proposed rule and providing comments. We have summarized the comments and provided our responses below.

### *A. On-Road Motor Vehicle Exhaust*

*Comment 1:* ACLPI asserts that EPA inappropriately relies upon an amendment to CAA section 211(c) by EPAct when re-evaluating a prior EPA approval on remand from the Court of Appeals. ACLPI notes that at the time Arizona submitted its BACM demonstration for approval, the section 211(c) waiver restrictions now relied upon did not exist and could not have served as a ''reasoned justification'' for rejecting CARB diesel.

*Response:* As authority for its conclusion that EPA's reliance on an amendment to section 211(c) by EPAct is inappropriate, ACLPI cites without elaboration only *Disimone* v. *EPA*, 121 F.3d 1262 (9th Cir. 1997). This case is inapt. The *Disimone* case involved a unique set of circumstances. Prior to *Disimone*, in 1990, the Ninth Circuit had ordered EPA to disapprove the Arizona SIP and to promulgate in its place a Federal implementation plan (FIP). *Delaney* v. *EPA*, 898 F.2d 687 (9th Cir. 1990), *cert. denied* 498 U.S. 998 (1990). Later in 1990 Congress amended the CAA and EPA requested that the Ninth Circuit recall its mandate in *Delaney* so that the Agency could take into account the 1990 Amendments in its action on remand. The Ninth Circuit denied EPA's request. EPA subsequently disapproved the Arizona SIP and promulgated a FIP as mandated by the *Delaney* court. EPA thereafter approved a SIP revision and rescinded its FIP. The *Disimone* court held that in so doing EPA acted contrary to a prior direct mandate of the Ninth Circuit and its action thus violated the law of the case. In addition the court held that EPA was collaterally estopped from claiming its action was required by the Act's statutory scheme, as amended in 1990, because the *Delaney* court had denied its motion to amend the judgment to conform to those amendments.

In contrast to *Disimone*, here there has been no prior judicial action with respect to the effect of the 2005 amendment that would have precluded EPA from proceeding with this regulatory action. Therefore the doctrines on which that court relied do not apply. We must comply with EPAct, the applicable current law, even though it did not exist at the time of EPA's original approval action.

*Comment 2:* ACLPI asserts that, regardless of the intervening EPAct restrictions, it does not agree that these restrictions prevent EPA from approving a waiver of preemption in order to allow CARB diesel fuel or other low emission diesel fuel as BACM. ACLPI argues that although CARB diesel fuel is not included on the Boutique Fuels List by virtue of its inclusion in the California SIP, the list does include ''low emission diesel,'' a fuel approved in the Texas SIP, and this fuel includes CARB diesel fuel as an approved low emission diesel fuel. ACLPI further states that because CARB diesel is already approved in California, it is also approved in the applicable Petroleum Administration for Defense District (PADD).

*Response:* As noted in our June 8, 2007 proposal, at 72 FR 31780, EPAct amended the CAA by requiring EPA, in consultation with the Department of Energy (DOE), to determine the total number of fuels approved into all SIPs under section 211(c)(4)(C), as of September 1, 2004, and to publish a list that identifies these fuels, the states and PADD in which they are used. CAA section 211(c)(4)(C)(v)(II). It also placed three additional restrictions on EPA's authority to waive preemption by approving a State fuel program into the SIP. These restrictions are as follows:

- First, EPA may not approve a state fuel program into the SIP if it would cause an increase in the total number of fuel types approved into SIPs as of September 1, 2004.
- Second, in cases where EPA approval of a fuel would increase the total number of fuel types on the list but not above the number approved as of September 1, 2004, because the total number of fuel types in SIPs is below the number of fuel types as of September 1, 2004, we are required to make a finding after consultation with DOE, that the new fuel will not cause supply or distribution interruptions or have a significant adverse impact on fuel producibility in the affected or contiguous areas.
- Third, with the exception of 7.0 psi RVP, EPA may not approve a state fuel into a SIP unless that fuel type is already approved in at least one SIP in the applicable PADD. CAA Section 211(c)(4)(C)(v)(I), (IV) and (V).

On December 28, 2006, EPA published a list of the total number of fuels approved into all SIPs, under

section 211(c)(4)(C), as of September 1, 2004 , in the **Federal Register**. 71 FR 78192. The final list (known as the Boutique Fuels List) includes eight types of fuels approved into SIPs under section 211(c)(4)(C) as of September 1, 2004, but does not include CARB diesel fuel because it is not approved into California's SIP under section 211(c)(4)(C).[2]

ACLPI is correct that Texas Low Emission Diesel fuel (also known as Texas LED fuel) is one of the eight types of fuels on the Boutique Fuels List. ACLPI is not correct, however, in asserting that because CARB diesel fuel is included as an approved low emission diesel fuel under the Texas LED rules, CARB diesel fuel is therefore already included among the fuels on the Boutique Fuels List. Texas LED fuel requirements allow CARB diesel fuel as a compliance option in lieu of meeting the regulatory standard for aromatic hydrocarbons and cetane number, but they also allow other compliance options that would not meet CARB diesel fuel requirements.[3]

Specifically, Texas LED fuel requirements allow four compliance options in lieu of meeting the 10% (volume) maximum aromatic hydrocarbon limit and the minimum cetane number of 48: (1) Fuel meeting CARB diesel requirements (except those for small refiners) as of January 18, 2005, including the designated equivalent limits; (2) fuel meeting the requirements of a CARB certified alternative diesel formulation (except those for small refiners) approved before January 18, 2005 to meet CARB diesel regulations in effect as of October 1, 2003; (3) fuel meeting the Texas LED requirements for alternative diesel fuel formulations; and (4) fuel meeting the requirements of an alternative emission reduction plan approved as a substitute fuel strategy that will achieve equivalent oxides of nitrogen ($NO_X$) emission reductions. Based on quarterly reports submitted to the Texas Commission on Environmental Quality for 2007, more than half the volume of Texas LED fuel in 2007 consists of fuel meeting compliance options (3) and (4) noted above.[4] Compliance options (3) and (4) do not exist in CARB diesel fuel.

The Texas LED fuel program was modeled on the CARB diesel fuel program, but Texas has adapted the program to meet needs specific to the Texas ozone nonattainment areas, especially the Houston-Galveston ozone nonattainment area, for which the Texas LED fuel program is approved into the SIP. As a result, the two diesel fuel programs are similar but not equivalent, as we noted in our August 3, 2006 final rule, in response to ACLPI's comment that we had failed to account for availability of similar diesel fuel in Texas in assessing the feasibility of using CARB diesel for nonroad engines. See 71 FR at 43981–82.[5]

ACLPI also asserts that, because CARB diesel is already approved in California, it is also approved in the applicable PADD. This is a reference to the PADD restriction, which is mentioned above and can be found in section 211(c)(4)(C)(v)(V). Under the PADD restriction, we are allowed to approve a fuel if it is ''approved in at least one [SIP] in the applicable [PADD].'' Arizona is in PADD 5, the same PADD as California, and Texas is in PADD 3. Our approval would, however, be subject to the other restrictions listed and discussed above. Thus, our approval must not cause an increase in the number of fuel types above those approved as of September 1, 2004, i.e., there must be ''room'' on the Boutique Fuels List, and we must consult with DOE on the effect of such a fuel on fuel supply and distribution in the affected or contiguous areas. As earlier mentioned, CARB diesel is approved into the California SIP. We would therefore, not be prohibited from approving CARB fuels for states within PADD 5, if there were room on the Boutique Fuels List. At this time, however, there is no room on the list, and therefore, we are prohibited from approving CARB diesel into Arizona's SIP since it would be a different fuel type that is not already on the list. Because CARB diesel fuel and Texas LED fuel are not equivalent, as noted above, the two are not interchangeable on the Boutique Fuels List, and thus the only type of low emission diesel fuel on the Boutique Fuels List is the Texas LED fuel program. This program is approved into a SIP in PADD 3, but is not approved into a SIP in the applicable PADD, which is PADD 5. Thus, EPA is further prohibited from approving a low emission diesel fuel program into the Arizona SIP because of the PADD restriction.

*B. Nonroad Engines and Equipment Exhaust*

*Comment 3:* Since EPA relies upon its previous assessment in the August 3, 2006 final rule, ACLPI reasserts the objections raised in its comments submitted in response to that rulemaking in its letter dated August 1, 2005.

*Response:* As noted in the June 8, 2007 proposed rule, EPA is not changing its assessment in the August 3, 2006 final rule that requiring CARB diesel fuel for the control of nonroad engines and equipment exhaust is not currently feasible and is therefore not required as a BACM in the Maricopa County area. Except as specifically modified below, EPA is relying for this final rule on its discussion of Nonroad Engines and Equipment Exhaust in Section II.B(2) of the Agency's July 1, 2005 proposed rule, 70 FR at 38066–38067. We are also relying on our responses to public comments on this issue in Section II.B of our August 3, 2006 final rule, 71 FR at 43981–43983.

We note one further update to the information in footnote 7 of the August 3, 2006 final rule. There are currently thirteen, rather than six, approval letters on the Texas LED fuel program Web site[6] providing for the use of alternative diesel fuel formulations. The second sentence in footnote 7 should now read as follows: ''Although Section 114.312(f) provides that alternative diesel fuel formulations must provide comparable or better reductions of $NO_X$ and PM, four of the thirteen alternative diesel fuel formulation approval letters to date have cited $NO_X$ reductions alone, or (in one case) reductions of $NO_X$ and

[2] Pursuant to section 211(c)(4)(B), California is not subject to the restriction in section 211(c)(4)(A) which triggers applicability of section 211(c)(4)(C).

[3] *See Summary Comparison of CA and TX Diesel Fuel Programs* in the docket for this rulemaking for a table describing major features of both programs. See also description of the Texas LED fuel program in EPA rulemaking actions at 66 FR 57196 (November 14, 2001), 70 FR 17321 (April 6, 2005), 70 FR 58325 (October 6, 2005), and 73 FR 8026 (February 12, 2008).

[4] See July 29, 2008 Memorandum, ''*Summary of total TxLED production volumes reported for 2007*'' in the docket for this rulemaking. This summary indicates that 41% of TxLED fuel volume consists of fuel meeting the Alternative Emission Reduction Plan compliance option, and 11% of TxLED fuel volume consists of fuel meeting the TxLED requirements for alternative diesel fuel formulations. Forty-seven percent of TxLED fuel volume for 2007 consists of fuel meeting either the California diesel fuel standards (except those for small refiners) or the California certified alternative fuel formulations (except those for small refiners).

[5] We described two significant differences between the two types of fuel: First, Texas LED rules allow the use of substitutes for LED fuel that achieve equivalent $NO_X$ reductions but not necessarily equivalent PM reductions, and second, Texas LED rules have been amended to remove the ultra low sulfur requirement, which directly affects PM emissions, from diesel fuel, while as of September 1, 2006, there is now a 15 ppm sulfur content requirement at the retail level for CARB diesel fuel. See 71 FR at 43981–82. Compliance option (4) mentioned above corresponds to the first difference noted here.

[6] As noted in footnote 7 of the August 3, 2006 final rule, the Web site location is: *http://www.tceq.state.tx.us/implementation/air/sip/cleandiesel.html.*

hydrocarbons, but not PM, as the basis of approval.''

*Comment 4:* ACLPI further asserts that, with respect to EPA's concerns that nonroad diesel fuel users will refuel outside the nonattainment area to avoid paying the higher cost of CARB diesel, the Texas LED rule provides guidance for Arizona since it applies to 102 counties even though only 8 of those counties are in the Houston nonattainment area. Citing EPA's November 14, 2001 final rule approving the Texas LED rule into the SIP, ACLPI asserts that the principal reason for extending the scope of the rule to so many counties was to prevent refueling outside the nonattainment area. 66 FR 57196, 57216. ACLPI states there is no reason that a similar approach could not be adopted in Arizona.

*Response:* In addition to the Texas LED fuel program, EPA has approved two other state fuel programs under CAA Section 211(c)(4)(C) in which the covered area included attainment areas outside the nonattainment area for which SIP approval was sought. See 66 FR 20927 (April 26, 2001) for the Gasoline Volatility Program in Eastern and Central Texas, and 67 FR 8200 (February 22, 2002) for the Gasoline Sulfur and Volatility Program in Atlanta, Georgia. In each of these three cases, EPA's approval of the state fuel program in attainment areas was based on the State's demonstration that emission reductions attributable to the state fuel program in the attainment areas was necessary to help achieve attainment in the nonattainment area for which SIP approval was sought.

Specifically, in the case of the Texas LED fuel program, EPA noted three reasons for Texas' conclusion that requiring LED fuel in the 110-county covered area benefits the 8-county Houston ozone nonattainment area. First, it will help ensure that LED fuel is used by intrastate and long-haul trucks that travel through the nonattainment area but purchase fuel in Texas outside the nonattainment area and within the covered area. Second, it will help reduce possible transport of ozone from the surrounding covered areas to the nonattainment area. Third, it will reduce the transport of $NO_X$ from the surrounding covered areas to the nonattainment area. See 66 FR at 57214 and 66 FR 36542, 36545.

ACLPI's reference to EPA's statement at 66 FR 57216 is misquoted; in this part of the November 14, 2001 final rule approving the Texas LED rule into the SIP, EPA stated that ''a principal purpose of extending the coverage of the LED rule to the 102 counties outside the 8-county Houston nonattainment area is to ensure that intrastate and long-haul trucks traveling through the Houston area but re-fueling outside the Houston area are re-fueling with LED fuel.'' (Emphasis added.) Thus preventing re-fueling with non-LED fuel outside the Houston area was one of three reasons for the expanded scope of the covered area, as described above, but it was not ''the'' principal reason, as ACLPI mistakenly asserts.

With respect to the potential use of CARB diesel fuel for nonroad engines and equipment, the preemption of state fuel controls in CAA section 211(c)(4)(A) does not extend to fuels used solely in nonroad engines and equipment and not for use in motor vehicles. See 70 FR 38064, 38066 (July 1, 2005), 69 FR 38958, 39072–73 (June 29, 2004). The choice of covered areas for a state diesel fuel program for nonroad engines and equipment might very well be affected, however, by the same kinds of reasons that would influence the design of the program if it were to include diesel fuel for on-road motor vehicles. We agree that the possible enlargement of the covered area beyond the nonattainment area is a factor Arizona could consider in evaluating the feasibility of a diesel fuel program for nonroad engines and equipment, but it is not the only factor Arizona would need to consider.

Such an enlarged program might help avoid the problem of re-fueling outside the Maricopa County area, but it would still face the same obstacles we have evaluated in our prior notices, *i.e.*, the uncertainty of fuel availability and the problem of fuel segregation and storage. Additionally, we note that the geographic considerations in assessing potential re-fueling avoidance are different in Arizona and Texas. Population in the Houston-Galveston ozone nonattainment area is about 22% of the statewide population but represents only 3% of the State's land area. By expanding the covered area to include the Dallas-Fort Worth and Beaumont-Port Arthur ozone nonattainment areas as well as 95 nearby counties, the Texas LED fuel program covers about 79% of statewide population and 35% of the State's land area. By contrast, population in the Phoenix nonattainment area is about 60% of statewide population but only 8% of the State's land area. If a fuel program were expanded to include Pima County, which includes the next largest metropolitan area in Arizona, the population in the covered area would be about 76% of statewide population but only 16% of the State's land area. (Statistics are based on 2000 Census Bureau data).[7]

*C. MSM Demonstration and Extension of Attainment Date*

*Comment 5:* ACLPI states that, because EPA did not undertake a new analysis of CARB diesel as a MSM for purposes of the attainment date extension, ACLPI incorporates by reference comments it submitted ''in response to previous rulemakings, as well as the arguments and analysis set forth in the Opening and Reply briefs filed in *Vigil* * * *'' (specifically Opening Brief, pp. 21–27;[8] Reply Brief, pp. 9–18.)''

*Response:* The *Vigil* Court's remand of EPA's approval of the attainment date extension is limited. The Court concluded that ''[w]e also remand the question of Arizona's eligibility for the extension, *insofar as that question depends on EPA's determination regarding MSM.*'' (Emphasis added.) 381 F.3d at 487. Therefore to the extent that ACLPI intends to incorporate by reference its comments and arguments on aspects of the extension other than MSM, it is precluded from raising them in this rulemaking.

While ACLPI does not specify, we assume that by ''previous rulemakings'' it is referring to EPA's proposed approvals of the serious area PM–10 plan for the Maricopa County area at 65 FR 19964 (April 13, 2000) and 66 FR 50252 (October 2, 2001). ACLPI commented on these proposed actions in letters from Joy Herr-Cardillo to Frances Wicher, EPA Region 9, dated July 20, 2000 and November 1, 2001. EPA has previously addressed the arguments relating to MSM and the attainment date extension as it relates to MSM raised by ACLPI in its briefs and these letters. See 67 FR at 48722–48725 and EPA's Response Brief in *Vigil* at 10–12 and 30–34. Discussions also relevant to these issues can be found in EPA's proposed approvals of the serious area PM–10 plan for the Maricopa County area at 65 FR 19964 and 66 FR 50252.

## III. Final Action

EPA is again approving the BACM demonstration in the MAG plan for the source categories of on-road and nonroad vehicle exhaust without CARB diesel. EPA has concluded that it cannot approve a CAA section 211(c)(4)(C)(i) waiver for Arizona for CARB diesel because the effect of such an approval would unlawfully increase the total

[7] See July 30, 2008 Memorandum, ''*Statistical Data for Arizona and Texas Based on 2000 Census*'' in docket for this rulemaking.

[8] EPA notes that the discussion of MSM begins on p. 24 of ACLPI's Opening Brief.

number of fuels approved into SIPs under section 211(c)(4)(C) as of September 1, 2004. Therefore, EPA is again approving the BACM demonstration in the MAG plan for the on-road source category without CARB diesel. Because EPA has found that CARB diesel is not feasible for nonroad engines and equipment because of the uncertainties with fuel availability, storage and segregation and concerns about program effectiveness due to owners and operators fueling outside the Maricopa County area, we are again approving BACM demonstration in the MAG plan for the nonroad source category without CARB diesel. For the reasons discussed above, EPA is also again approving the MSM demonstration in the MAG plan and is confirming that we appropriately granted in 2002 and 2006 the State's request for an extension of the attainment deadline for the area from December 31, 2001 to December 31, 2006. These actions are codified at 40 CFR 52.123(j)(2), (4) and (7) and remain in effect. See 67 FR at 48739.

### IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Executive Order 12898 (59 FR 7629, February 16, 1994) establishes a Federal policy for incorporating environmental justice into Federal agency actions by directing agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. Today's action will not have disproportionately high and adverse effects on any communities in the area, including minority and low-income communities.

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 14, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: August 4, 2008.

**Laura Yoshii,**

*Acting Regional Administrator, Region IX.*

[FR Doc. E8–18626 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 63

**[EPA–R09–OAR–2008–0555; FRL–8701–7]**

## Delegation of National Emission Standards for Hazardous Air Pollutants for Source Categories; State of Arizona, Arizona Department of Environmental Quality, Pima County Department of Environmental Quality

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is amending certain regulations to reflect the current delegation status of national emission standards for hazardous air pollutants (NESHAP) in Arizona. Several NESHAP were delegated to the Arizona Department of Environmental Quality on June 4, 2008, and to the Pima County Department of Environmental Quality on June 16, 2008. The purpose of this action is to update the listing in the Code of Federal Regulations.

**DATES:** This rule is effective on October 14, 2008, without further notice, unless EPA receives adverse comments by September 15, 2008. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

**ADDRESSES:** Submit comments, identified by docket number EPA–R09–OAR–2008–0555, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or delivery:* Andrew Steckel (AIR–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or e-mail. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

*Docket:* The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Mae Wang, EPA Region IX, (415) 947–4124, *wang.mae@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

**Table of Contents**



## I. Background

### *A. Delegation of NESHAP*

Section 112(l) of the Clean Air Act, as amended in 1990 (CAA), authorizes EPA to delegate to state or local air pollution control agencies the authority to implement and enforce the standards set out in the Code of Federal Regulations, Title 40 (40 CFR), part 63, National Emission Standards for Hazardous Air Pollutants for Source Categories. On November 26, 1993, EPA promulgated regulations, codified at 40 CFR part 63, Subpart E (hereinafter referred to as ''Subpart E''), establishing procedures for EPA's approval of state rules or programs under section 112(l) (see 58 FR 62262). Subpart E was later amended on September 14, 2000 (see 65 FR 55810).

Any request for approval under CAA section 112(l) must meet the approval criteria in 112(l)(5) and Subpart E. To streamline the approval process for future applications, a state or local agency may submit a one-time demonstration that it has adequate authorities and resources to implement and enforce any CAA section 112 standards. If such demonstration is approved, then the state or local agency would no longer need to resubmit a demonstration of these same authorities and resources for every subsequent request for delegation of CAA section 112 standards. However, EPA maintains the authority to withdraw its approval if the State does not adequately implement or enforce an approved rule or program.

### *B. ADEQ Delegations*

On July 17, 1998, EPA published a direct final action delegating to the Arizona Department of Environmental Quality (ADEQ) several NESHAP and approving ADEQ's delegation mechanism for future standards (see 63 FR 38478). That action explained the procedure for EPA to grant delegations to ADEQ by letter, with periodic **Federal Register** listings of standards that have been delegated. On April 17, 2008, ADEQ requested delegation of the following NESHAP contained in 40 CFR part 63:

- Subpart DDDD—NESHAP: Plywood and Composite Wood Products
- Subpart DDDDD—NESHAP for Industrial, Commercial, and Institutional Boilers and Process Heaters

On June 4, 2008, EPA granted delegation to ADEQ for these NESHAP, along with any amendments to previously-delegated NESHAP, as of July 1, 2006. Today's action is serving to notify the public of the June 4, 2008, delegations and to codify these delegations into the Code of Federal Regulations.

### *C. PDEQ Delegations*

On June 28, 1999, EPA published a direct final action delegating to the Pima County Department of Environmental Quality (PDEQ) several NESHAP and approving PDEQ's delegation mechanism for future standards (see 64 FR 34560). That action explained the procedure for EPA to grant delegations to PDEQ by letter, with periodic **Federal Register** listings of standards that have been delegated. On May 23, 2008, PDEQ requested delegation of the following NESHAP contained in 40 CFR part 63:

- Subpart J—NESHAP for Polyvinyl Chloride and Copolymers Production
- Subpart MM—NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills
- Subpart XX—National Emission Standards for Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations
- Subpart DDDD—NESHAP: Plywood and Composite Wood Products
- Subpart WWWWW—National Emission Standards for Hospital Ethylene Oxide Sterilizers
- Subpart YYYYY—NESHAP for Area Sources: Electric Arc Furnace Steelmaking Facilities
- Subpart ZZZZZ—NESHAP for Iron and Steel Foundries Area Sources
- Subpart BBBBBB—NESHAP for Source Category: Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities
- Subpart CCCCCC—NESHAP for Source Category: Gasoline Dispensing Facilities
- Subpart DDDDDD—NESHAP for Polyvinyl Chloride and Copolymers Production Area Sources
- Subpart EEEEEE—NESHAP for Primary Copper Smelting Area Sources
- Subpart FFFFFF—NESHAP for Secondary Copper Smelting Area Sources
- Subpart GGGGGG—NESHAP for Primary Nonferrous Metals Area Sources—Zinc, Cadmium, and Beryllium
- Subpart HHHHHH—NESHAP: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources
- Subpart LLLLLL—NESHAP for Acrylic and Modacrylic Fibers Production Area Sources
- Subpart MMMMMM—NESHAP for Carbon Black Production Area Sources
- Subpart NNNNNN—NESHAP for Chemical Manufacturing Area Sources: Chromium Compounds
- Subpart OOOOOO—NESHAP for Flexible Polyurethane Foam Production and Fabrication Area Sources
- Subpart PPPPPP—NESHAP for Lead Acid Battery Manufacturing Area Sources
- Subpart QQQQQQ—NESHAP for Wood Preserving Area Sources

• Subpart RRRRRR—NESHAP for Clay Ceramics Manufacturing Area Sources
• Subpart SSSSSS—NESHAP for Glass Manufacturing Area Sources
• Subpart TTTTTT—NESHAP for Secondary Nonferrous Metals Processing Area Sources

On June 16, 2008, EPA granted delegation to PDEQ for these NESHAP, along with any amendments to previously-delegated NESHAP, as of February 1, 2008. Today's action is serving to notify the public of the June 16, 2008, delegations and to codify these delegations into the Code of Federal Regulations.

**II. EPA Action**

Today's document serves to notify the public of the delegation of NESHAP to ADEQ on June 4, 2008, and to PDEQ on June 16, 2008. Today's action will codify these delegations into the Code of Federal Regulations.

**III. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a delegation request that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7412(l); 40 CFR 63.91(b). Thus, in reviewing state delegation submissions, our role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely updates the list of approved delegations in the Code of Federal Regulations and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the delegation submission is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 14, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

**List of Subjects in 40 CFR Part 63**

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

**Authority:** This action is issued under the authority of Section 112 of the Clean Air Act, as amended, 42 U.S.C. 7412.

Dated: July 25, 2008.

**Amy Zimpfer,**

*Acting Director, Air Division, Region IX.*

■ Title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

## PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

## Subpart E—Approval of State Programs and Delegation of Federal Authorities

■ 2. Section 63.99 is amended by revising paragraph (a)(3) to read as follows:

**§ 63.99 Delegated Federal authorities.**

(a) * * *

(3) The following table lists the specific part 63 standards that have been delegated unchanged to the air pollution control agencies in the State of Arizona. The (X) symbol is used to indicate each category that has been delegated.

DELEGATION STATUS FOR PART 63 STANDARDS—ARIZONA

| Subpart | Description | ADEQ [1] | MCAQD [2] | PDEQ [3] | PCAQCD [4] |
|---|---|---|---|---|---|
| A | General Provisions | X | X | X | X |
| F | Synthetic Organic Chemical Manufacturing Industry | X | X | X | X |
| G | Synthetic Organic Chemical Manufacturing Industry: Process Vents, Storage Vessels, Transfer Operations, and Wastewater. | X | X | X | X |
| H | Organic Hazardous Air Pollutants: Equipment Leaks | X | X | X | X |

DELEGATION STATUS FOR PART 63 STANDARDS—ARIZONA—Continued

| Subpart | Description | ADEQ [1] | MCAQD [2] | PDEQ [3] | PCAQCD [4] |
|---|---|---|---|---|---|
| I | Organic Hazardous Air Pollutants: Certain Processes Subject to the Negotiated Regulation for Equipment Leaks. | X | X | X | X |
| J | Polyvinyl Chloride and Copolymers Production | X | X | X | ..... |
| L | Coke Oven Batteries | X | X | X | X |
| M | Perchloroethylene Dry Cleaning | X | X | X | X |
| N | Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks. | X | X | X | X |
| O | Ethylene Oxide Sterilization Facilities | X | X | X | X |
| Q | Industrial Process Cooling Towers | X | X | X | X |
| R | Gasoline Distribution Facilities | X | X | X | X |
| S | Pulp and Paper | X | X | X | ..... |
| T | Halogenated Solvent Cleaning | X | X | X | X |
| U | Group I Polymers and Resins | X | X | X | X |
| W | Epoxy Resins Production and Non-Nylon Polyamides Production | X | X | X | X |
| X | Secondary Lead Smelting | X | X | X | X |
| AA | Phosphoric Acid Manufacturing Plants | X | X | X | ..... |
| BB | Phosphate Fertilizers Production Plants | X | X | X | ..... |
| CC | Petroleum Refineries | X | X | X | X |
| DD | Off-Site Waste and Recovery Operations | X | X | X | X |
| EE | Magnetic Tape Manufacturing Operations | X | X | X | X |
| GG | Aerospace Manufacturing and Rework Facilities | X | X | X | X |
| HH | Oil and Natural Gas Production Facilities | X | X | X | ..... |
| JJ | Wood Furniture Manufacturing Operations | X | X | X | X |
| KK | Printing and Publishing Industry | X | X | X | X |
| LL | Primary Aluminum Reduction Plants | X | ..... | X | ..... |
| MM | Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills. | X | X | X | ..... |
| OO | Tanks—Level 1 | X | X | X | X |
| PP | Containers | X | X | X | X |
| QQ | Surface Impoundments | X | X | X | X |
| RR | Individual Drain Systems | X | X | X | X |
| SS | Closed Vent Systems, Control Devices, Recovery Devices and Routing to a Fuel Gas System or a Process. | X | X | X | ..... |
| TT | Equipment Leaks—Control Level 1 | X | X | X | ..... |
| UU | Equipment Leaks—Control Level 2 | X | X | X | ..... |
| VV | Oil-Water Separators and Organic-Water Separators | X | X | X | X |
| WW | Storage Vessels (Tanks)—Control Level 2 | X | X | X | ..... |
| XX | Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations. | X | X | X | ..... |
| YY | Generic MACT Standards | X | X | X | ..... |
| CCC | Steel Pickling | X | X | X | ..... |
| DDD | Mineral Wool Production | X | X | X | ..... |
| EEE | Hazardous Waste Combustors | X | X | X | ..... |
| GGG | Pharmaceuticals Production | X | X | X | ..... |
| HHH | Natural Gas Transmission and Storage Facilities | X | X | X | ..... |
| III | Flexible Polyurethane Foam Production | X | X | X | ..... |
| JJJ | Group IV Polymers and Resins | X | X | X | X |
| LLL | Portland Cement Manufacturing Industry | X | X | X | ..... |
| MMM | Pesticide Active Ingredient Production | X | X | X | ..... |
| NNN | Wool Fiberglass Manufacturing | X | X | X | ..... |
| OOO | Manufacture of Amino/Phenolic Resins | X | X | X | ..... |
| PPP | Polyether Polyols Production | X | X | X | ..... |
| QQQ | Primary Copper Smelting | X | X | X | ..... |
| RRR | Secondary Aluminum Production | X | X | X | ..... |
| TTT | Primary Lead Smelting | X | X | X | ..... |
| UUU | Petroleum Refineries: Catalytic Cracking, Catalytic Reforming, and Sulfur Recovery Units. | X | X | X | ..... |
| VVV | Publicly Owned Treatment Works | X | X | X | ..... |
| XXX | Ferroalloys Production | X | X | X | ..... |
| AAAA | Municipal Solid Waste Landfills | X | X | X | ..... |
| CCCC | Manufacturing of Nutritional Yeast | X | X | X | ..... |
| DDDD | Plywood and Composite Wood Products | X | ..... | X | ..... |
| EEEE | Organic Liquids Distribution (non-gasoline) | X | X | X | ..... |
| FFFF | Miscellaneous Organic Chemical Manufacturing | X | X | X | ..... |
| GGGG | Solvent Extraction for Vegetable Oil Production | X | X | X | ..... |
| HHHH | Wet-Formed Fiberglass Mat Production | X | X | X | ..... |
| IIII | Surface Coating of Automobiles and Light-Duty Trucks | X | X | ..... | ..... |
| JJJJ | Paper and Other Web Coating | X | X | X | ..... |
| KKKK | Surface Coating of Metal Cans | X | X | X | ..... |
| MMMM | Miscellaneous Metal Parts and Products | X | X | X | ..... |
| NNNN | Large Appliances | X | X | X | ..... |
| OOOO | Printing, Coating, and Dyeing of Fabrics and Other Textiles | X | X | X | ..... |

DELEGATION STATUS FOR PART 63 STANDARDS—ARIZONA—Continued

| Subpart | Description | ADEQ [1] | MCAQD [2] | PDEQ [3] | PCAQCD [4] |
|---|---|---|---|---|---|
| PPPP | Surface Coating of Plastic Parts and Products | X | X | ..... | ..... |
| QQQQ | Wood Building Products | X | X | X | ..... |
| RRRR | Surface Coating of Metal Furniture | X | X | X | ..... |
| SSSS | Surface Coating of Metal Coil | X | X | X | ..... |
| TTTT | Leather Finishing Operations | X | X | X | ..... |
| UUUU | Cellulose Products Manufacturing | X | X | X | ..... |
| VVVV | Boat Manufacturing | X | X | X | ..... |
| WWWW | Reinforced Plastics Composites Production | X | X | X | ..... |
| XXXX | Tire Manufacturing | X | X | X | ..... |
| YYYY | Stationary Combustion Turbines | X | X | X | ..... |
| ZZZZ | Stationary Reciprocating Internal Combustion Engines | X | X | ..... | ..... |
| AAAAA | Lime Manufacturing Plants | X | X | X | ..... |
| BBBBB | Semiconductor Manufacturing | X | X | X | ..... |
| CCCCC | Coke Oven: Pushing, Quenching and Battery Stacks | X | X | X | ..... |
| DDDDD | Industrial, Commercial, and Institutional Boiler and Process Heaters | X | ..... | ..... | ..... |
| EEEEE | Iron and Steel Foundries | X | X | X | ..... |
| FFFFF | Integrated Iron and Steel | X | X | X | ..... |
| GGGGG | Site Remediation | X | X | X | ..... |
| HHHHH | Miscellaneous Coating Manufacturing | X | X | X | ..... |
| IIIII | Mercury Emissions from Mercury Cell Chlor-Alkali Plants | X | X | X | ..... |
| JJJJJ | Brick and Structural Clay Products Manufacturing | X | X | X | ..... |
| KKKKK | Clay Ceramics Manufacturing | X | X | X | ..... |
| LLLLL | Asphalt Roofing and Processing | X | X | X | ..... |
| MMMMM | Flexible Polyurethane Foam Fabrication Operation | X | X | X | ..... |
| NNNNN | Hydrochloric Acid Production | X | X | X | ..... |
| PPPPP | Engine Test Cells/Stands | X | X | X | ..... |
| QQQQQ | Friction Products Manufacturing | X | X | X | ..... |
| RRRRR | Taconite Iron Ore Processing | X | X | X | ..... |
| SSSSS | Refractory Products Manufacturing | X | X | X | ..... |
| TTTTT | Primary Magnesium Refining | X | X | X | ..... |
| WWWWW | Hospital Ethylene Oxide Sterilizers | ..... | ..... | X | ..... |
| YYYYY | Area Sources: Electric Arc Furnace Steelmaking Facilities | ..... | ..... | X | ..... |
| ZZZZZ | Iron and Steel Foundries Area Sources | ..... | ..... | X | ..... |
| BBBBBB | Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities | ..... | ..... | X | ..... |
| CCCCCC | Gasoline Dispensing Facilities | ..... | ..... | X | ..... |
| DDDDDD | Polyvinyl Chloride and Copolymers Production Area Sources | ..... | ..... | X | ..... |
| EEEEEE | Primary Copper Smelting Area Sources | ..... | ..... | X | ..... |
| FFFFFF | Secondary Copper Smelting Area Sources | ..... | ..... | X | ..... |
| GGGGGG | Primary Nonferrous Metals Area Sources—Zinc, Cadmium, and Beryllium | ..... | ..... | X | ..... |
| HHHHHH | Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources. | ..... | ..... | X | ..... |
| LLLLLL | Acrylic and Modacrylic Fibers Production Area Sources | ..... | ..... | X | ..... |
| MMMMMM | Carbon Black Production Area Sources | ..... | ..... | X | ..... |
| NNNNNN | Chemical Manufacturing Area Sources: Chromium Compounds | ..... | ..... | X | ..... |
| OOOOOO | Flexible Polyurethane Foam Production and Fabrication Area Sources | ..... | ..... | X | ..... |
| PPPPPP | Lead Acid Battery Manufacturing Area Sources | ..... | ..... | X | ..... |
| QQQQQQ | Wood Preserving Area Sources | ..... | ..... | X | ..... |
| RRRRRR | Clay Ceramics Manufacturing Area Sources | ..... | ..... | X | ..... |
| SSSSSS | Glass Manufacturing Area Sources | ..... | ..... | X | ..... |
| TTTTTT | Secondary Nonferrous Metals Processing Area Sources | ..... | ..... | X | ..... |

[1] Arizona Department of Environmental Quality.
[2] Maricopa County Air Quality Department.
[3] Pima County Department of Environmental Quality.
[4] Pinal County Air Quality Control District.

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[FR Doc. E8–18748 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 10

**[PS Docket No. 07–287; FCC 08–164]**

### Commercial Mobile Alert System

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission or FCC) complies with section 602(c) of the Warning, Alert and Response Network (WARN) Act by adopting rules that require non-commercial educational (NCE) and public broadcast television station licensees and permittees to install equipment and technologies that will provide these licensees/permittees with the ability to enable the distribution of geo-targeted Commercial Mobile Alert System (CMAS) alerts to participating Commercial Mobile Service (CMS)

providers. The Commission's stated goal is to implement section 602(c) in a manner consistent with the CMAS architecture and technologically neutral rules the Commission adopted in the CMAS First Report and Order. In this document, the Commission also complies with section 602(f) of the WARN Act by adopting rules requiring technical testing for commercial mobile service providers that elect to transmit emergency alerts and for the devices and equipment used by such providers for transmitting such alerts.

**DATES:** Effective October 14, 2008, except for § 10.350 (a)(7) and (b), which contain new or modified information collection requirements that have not been approved by OMB. After OMB has approved them, the Commission will publish a document in the **Federal Register** announcing the effective date.

**FOR FURTHER INFORMATION CONTACT:** Jeffery Goldthorp, Communications Systems Analysis Division, Public Safety and Homeland Security Bureau, Federal Communications Commission at (202) 418–1096.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's CMAS Second Report and Order in PS Docket No. 07–287, adopted and released on July 8, 2008. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., in person at 445 12th Street, SW., Room CY–B402, Washington, DC 20554, via telephone at (202) 488–5300, via facsimile at (202) 488–5563, or via e-mail at *FCC@BCPIWEB.COM.* Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by sending an e-mail to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530, TTY (202) 418–0432. This document is also available on the Commission's Web site at *http://www.fcc.gov.*

**Synopsis of the Order**

1. Section 602(c) requires the Commission to require ''licensees and permittees of noncommercial educational broadcast stations or public broadcast stations (as those terms are defined in section 397(6) of the Communications Act of 1934 (47 U.S.C. 397(6))) to install necessary equipment and technologies on, or as part of, any broadcast television digital signal transmitter * * * '' Section 397(6) of the Communications Act defines the terms ''noncommercial educational broadcast station'' and ''public broadcast station'' to mean a television or radio broadcast station which: (1) Under the rules and regulations of the Commission in effect on November 2, 1978, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (2) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.

2. In the CMAS NPRM (73 FR 546, January 3, 2008) the Commission sought comment on the scope of section 602(c). The Commission noted that although the caption of section 602(c) refers to digital television transmissions, it mandates that the Commission impose any equipment requirements on licensees and permittees of NCE and public broadcast stations as those terms are defined under section 397(6) of the Communications Act. That provision references both radio and television broadcast stations. The Commission sought comment on this definition as it relates to section 602(c) of the WARN Act, and further asked whether it was a fair reading of the language to conclude that this section applies only to licensees and permittees of NCE and public broadcast television stations. The Association of Public Television Stations (APTS) noted in its comments that datacasting and the equipment required for it depends on the ''unique capabilities of digital television,'' and that accordingly, the section applies only to digital television transmission. DataFM asserted that section 602(c) requires installation of equipment at all NCE and public broadcast stations.

3. The Commission concluded that Congress intended the equipment requirements set forth in section 602(c) of the WARN Act to apply only to licensees and permittees of NCE and public broadcast television stations and not radio stations. Section 602(c) requires that the Commission complete a proceeding to require licensees and permittees of NCE or public broadcast stations to install necessary equipment and technologies ''on, or as part of, any broadcast television digital signal transmitter'' (emphasis added) to enable the distribution of geographically targeted alerts by CMS providers. This language clearly shows that Congress intended that these equipment requirements apply only to NCE and public broadcast television stations. The use of the term ''any'' indicates that if a station lacks a television transmitter—e.g., if the station is a radio broadcast station—there is no installation requirement. Additionally, APTS has indicated that its ability to perform the functions contemplated by section 602(c), enabling the distribution of geographically targeted alerts by participating CMS providers, is dependent on capabilities unique to digital television. For these reasons, the Commission disagreed with DataFM's conclusion that section 602(c) requires installation of equipment at all NCE and public broadcast stations.

*Section 602(c)—Necessary Equipment to Support CMS Provider Geo-Targeting*

4. In the CMAS NPRM the Commission sought comment regarding the equipment required by section 602(c) of the WARN Act. Specifically, the Commission asked how this digital television-based system would interface with the CMAS. The Commission also asked how the requirement regarding the geo-targeting of CMAS alerts would fit into a centrally administered CMAS as envisioned by the Commercial Mobile Service Alert Advisory Committee (CMSAAC). Further, the Commision sought comment regarding how the digital television-based system would implement the message formats defined by the ''C'' interface.

5. Apart from APTS, no commenters addressed the specific type of equipment that would need to be installed to satisfy section 602(c) of the WARN Act. In its comments and reply comments, APTS argued that by including section 602(c) in the WARN Act, Congress required that datacasting, and the equipment necessary for its implementation, be part of the CMAS. APTS further noted that datacasting equipment would not be inconsistent with the CMAS as recommended by the CMSAAC, but rather would be ''one component of a comprehensive alert and warning system that includes necessary redundancies to ensure that the public receives essential information under any circumstances.'' Such redundancies, argued APTS, would enhance the effectiveness and security of the CMAS.

6. APTS listed four types of equipment it says NCE/public broadcast television stations would need to install in order to transmit geo-targeted alerts to participating CMS providers. In listing this equipment, APTS contemplated that the Public Broadcasting System (PBS) would receive CMAS alerts directly from the Alert Gateway and transmit the CMAS

alert data via national satellite feed to NCE/public broadcast television stations. NCE/public broadcast television stations would then transmit the geo-targeted CMAS alerts via their digital television transmitters to CMS Provider Gateways located in their television service areas, providing a redundant, alternate method of delivery of CMAS alerts to CMS Provider Gateways. APTS described the equipment needed as follows:

• ''Geo-targeting Systems.'' According to APTS, this equipment would have the capability to activate those NCE and public broadcast digital television transmitters necessary to transmit the CMAS alert to areas in which CMS Provider Gateways are located, while all other NCE and public broadcast digital television transmitters would ignore the CMAS alert transmission.

• ''Groomers.'' APTS stated that this equipment (also referred to as ''dynamic bitrate capability'') would automatically adjust a selected program service's video bitrate to make room for CMAS alert data when those data are present. APTS stated that such a capability would allow the licensee to have full use of its transmission capability when CMAS alert data are not present. APTS argued that installation of this equipment is necessary for each licensee's master control (with redundancy) as well as at each licensee's remote transmitter sites (also with redundancy).

• ''Data Receivers.'' APTS asserted that this equipment is necessary for the stations to receive the CMAS data from PBS. APTS proposed that each master control and each remote transmitter have redundant receivers. APTS also proposed that small satellite receive antennas be installed for each remote transmitter should the licensee's data distribution via its studio-to-transmitter links be unavailable.

• PBS Equipment. Additionally, according to APTS, PBS will require equipment to route the CMAS data around its other functions. APTS reported that PBS will receive the CMAS data from appropriate origination point(s), process and bridge the data around the master control systems, and transmit the data via satellite to all licensees, remote transmitters, and other selected receive locations. APTS stated that PBS will install redundant systems at both its main Network Operations Center (NOC) and its Disaster Recover Site (DRS), as well as install both data security and physical security at both locations.

• Back-up Power Equipment. Finally, APTS recommended that licensees of NCE and public broadcast television stations be required to install back-up power equipment.

7. In order for NCE/public broadcast television station licensees/permittees to enable geo-targeting by participating CMS providers, they must be able to interface with the CMAS in a manner consistent with the rules adopted in the CMAS First Report and Order (73 FR 43099, July 24, 2008). According to the Commission, the most appropriate way for them to do this would be to install equipment that will allow them to receive CMAS alerts from the Alert Gateway over an interface and then to transmit such alerts to participating CMS providers. Under such an approach, licensees and permittees of NCE/public broadcast television stations would provide a redundant path by which participating CMS providers could receive geo-targeted alerts. Accordingly, the Commission required licensees and permittees of NCE/public broadcast television stations to install necessary equipment and technologies at, or as part of, their digital television transmitters that will provide them with the capability to receive CMAS alerts sent from the Alert Gateway over a secure interface and to transmit the alerts to the CMS Provider Gateways of participating CMS providers.

8. As noted above, APTS contemplated that licensees and permittees of NCE/public broadcast television stations will use datacasting technology to receive and deliver CMAS alerts to participating CMS providers. While the Commission believed that datacasting technology and the associated equipment described above is one way of meeting this requirement, it did not want to foreclose other DTV transmitter-based technologies that may exist in the future. Accordingly, in keeping with the technologically neutral policy articulated in the CMAS First Report and Order, the Commission's rules will allow, but not require, the use of datacasting to fulfill the requirements of section 602(c) and the Commission's rules, as long as NCE and public broadcast television station licensees and permittees do so in a manner consistent with the Commission's CMAS rules, including the CMAS architecture previously adopted in the CMAS First Report and Order. The Commission also recognized APTS's proposed use of datacasting assumes that PBS will provide a feed from the Alert Gateway to the NCE/public broadcast station digital television transmitters and associated receivers. For purposes of this Order, the Commission assumed that PBS or a similarly situated entity will provide the interface feed between the Alert Gateway and the NCE/public broadcast television stations. PBS or a similarly situated entity must work with the Alert Gateway Administrator to establish the necessary interface by which CMAS alerts will be sent to NCE and public broadcast television stations.

9. The Commission further noted that section 606(b) of the WARN Act provides that NCE and public broadcast station licensees and permittees shall be compensated by the Assistant Secretary of Commerce for Communications and Information for reasonable costs incurred in complying with the requirements imposed pursuant to section 602(c) of the WARN Act. The Commission noted that some, if not all, NCE and public broadcast television stations may need this funding to comply with the equipment requirements the Commission adopted in the CMAS Second Report and Order. Accordingly, the Commission required NCE and public broadcast television station licensees and permittees to install the required equipment no later than 18 months from the date of receipt of the funding permitted under section 606(b) of the WARN Act or 18 months from the effective date of these rules, whichever is later. The Commission concluded that this should give NCE and public broadcast television stations adequate time to obtain any necessary funding, determine the specific equipment needed and acquire and install that equipment.

10. According to the Commission, this approach satisfies section 602(c) and serves the public interest in that it requires NCE and public broadcast television station licensees and permittees to install necessary equipment on, or as part of, their digital television transmitters to enable geo-targeting by participating CMS providers. The Commission concluded that its approach also ensures that NCE and public broadcast television station licensees and permittees fulfill this requirement in a way that complements the CMAS architecture envisioned by the CMSAAC and rules the Commission adopted in the CMAS First Report and Order. In adopting these rules in this Second Report and Order, the Commission provides participating CMS providers with a redundant, alternate distribution path by which they may choose to receive geo-targeted CMAS alerts from the Alert Gateway. As such, this action will provide an increased level of redundancy to the CMAS architecture.

*Section 602(f)—Testing*

11. Section 602(f) of the WARN Act states that the Commission ''shall

require by regulation technical testing for commercial mobile service providers that elect to transmit emergency alerts and for the devices and equipment used by such providers for transmitting such alerts.'' In the CMAS NPRM, the Commission sought comment on what type of testing regime the Commission should require. The Commission noted that the CMSAAC proposed that, in order to assure the reliability and performance of this new system, certain procedures for logging CMAS alerts at the Alert Gateway and for testing the system at the Alert Gateway and on an end-to-end basis should be implemented. The Commission sought comment on these proposed procedures, and asked whether they satisfied the requirements of section 602(f) of the WARN Act. The Commission also sought comment on whether there should be some form of testing of the CMAS that sends test messages to the mobile device and the subscriber. The Commission noted that it had a testing regime in place for the Emergency Alert System (EAS), and asked whether the EAS testing rules offered a model for CMAS testing. The Commission noted that in the EAS rules, internal system tests are combined with tests that are heard (or in some cases seen) by the public, and asked whether some similar form of test that alerts the public should be required for the CMAS. The Commission asked how subscribers should be made aware of such tests if testing were to involve subscribers.

12. Commenters generally supported the testing regime recommended by the CMSAAC. They did not object to testing during development and internal testing, and assumed that some sort of logging of results will be part of the ultimate testing process. For example, the California Public Utilities Commission (CAPUC) supported the recommendations of the CMSAAC and endorsed thorough testing before deployment. Similarly, the National Emergency Numbering Association (NENA) endorsed testing and noted that there needs to be ample time devoted to testing the CMAS before its deployment. According to the Wireless RERC, there is a need to develop a thorough testing regime to ensure that the CMAS will be accessible and inclusive of all people, including those with disabilities and those who do not speak English.

13. Although all parties that commented on the testing issue agree that a thorough testing regime is essential for an effective CMAS, the parties differ regarding the timing of tests, or whether testing should affect end-users. For example, T-Mobile, Nokia, and Alltel all supported testing, but recommended that the Commission follow the CMSAAC recommendations that end-to-end testing be defined as testing between the Alert initiator and the Alert Gateway, and that there be no testing that involves the end-user. According to Nokia, end-user testing would cause unnecessary network use and would result in customer confusion. AT&T agreed that any CMAS testing regime should follow the CMSAAC recommendations and asserted that ''the EAS testing rules do not provide an effective model for testing the CMAS.'' In its reply comments, Interstate Wireless supported testing to end-user ''test units.'' Similarly, by supporting the EAS testing regime as a model for testing the CMAS, CAPUC inherently supported testing to end-users. CellCast recommended a separate rulemaking for testing, and believes that testing to the end-user is appropriate. In its reply comments, CellCast also recommended that the Commission adopt a monthly end-to-end testing requirement.

14. In ex parte comments submitted on May 23, 2008, CTIA submitted a proposal for testing requirements that were developed together with Alltel, AT&T, Sprint Nextel, T-Mobile and Verizon Wireless. Under CTIA's proposal, participating CMS providers would participate in monthly testing of the CMAS system. The monthly test would be initiated by the federally-administered Alert Gateway at a set day and time and would be distributed through the commercial mobile service provider infrastructure and by participating CMS providers over their networks. Upon receipt of the test message, participating CMS providers would have a 24-hour window to distribute the test message in their CMAS coverage areas in a manner that avoids congestion or other adverse effects on their networks. Under CTIA's proposal, mobile devices supporting CMAS would not be required to support reception of the required monthly test and participating CMS providers would not be required to deliver required monthly tests to subscriber handsets, but a participating CMS provider may provide mobile devices with the capability for receiving these tests. CTIA's testing proposal also featured regular testing from the ''C'' interface to ensure the ability of the Federal Alert Gateway to communicate with the CMS Provider Gateway.

15. The Commission agreed with the CMSAAC and most commenters that periodic testing of all components of the CMAS, including the CMS provider's components would serve the public interest and is consistent with the WARN Act. Accordingly, as recommended by CTIA and several CMS providers, the Commission will require each participating CMS provider to participate in monthly testing of CMAS message delivery to the CMS Provider Gateway and within the CMS providers' infrastructure. CMS providers must receive these required monthly test messages and must also distribute those test messages to their coverage area within 24 hours of receipt by the CMS Provider Gateway. CMS providers may determine how this delivery will be accomplished and may stagger the delivery of the required monthly test message over time and over geographic subsets of their coverage area to manage the traffic loads and accommodate maintenance windows. Participating CMS providers must keep an automated log of required monthly test messages received by the CMS Provider Gateway from the Federal Alert Gateway.

16. CMAS required monthly tests will be initiated only by the Federal Alert Gateway Administrator using a defined test message; real event codes and alert messages may not be used for test messages. A participating CMS provider may forego these monthly tests if pre-empted by actual alert traffic or in the event of unforeseen conditions in the CMS provider's infrastructure, but shall indicate this condition by a response code to the Federal Alert Gateway. The Commission will not require that CMS providers make available mobile devices that support reception of the required monthly test. The Commission will, however, allow CMS providers to choose to do so. CMS providers that choose not to make the required monthly test available to subscribers must find alternate methods of ensuring that subscriber handsets will be able to receive CMAS alert messages.

17. The Commision also adopted CTIA's recommendation that, in addition to the required monthly test, there should be periodic testing of the interface between the Federal Alert Gateway and each CMS Provider Gateway to ensure the availability and viability of both gateway functions. Additional periodic testing to ensure that the Federal Alert Gateway is able to deliver CMAS alerts to the CMS Provider Gateway will further strengthen the reliability of the CMAS. CMS Provider Gateways must send an acknowledgement upon receipt of these interface test messages. CMS providers must comply with these testing requirements no later than the date of deployment of the CMAS, which is the date that CMAS development is complete and the CMAS is functional and capable of providing alerts to the public. All of these testing requirements

are consistent with the testing procedures advocated by CTIA. The Commission declined to adopt some of the specific testing requirements that CTIA suggested, such as designating a specific day and time for the required monthly test and defining the exact parameters and content of the required monthly test, the expiration time for the required monthly test, and specific details of the periodic tests of the interface between the Federal Alert Gateway and participating CMS Provider Gateways. Because the CMAS must still undergo significant development and the Federal Alert Aggregator and Gateway have just recently been identified, the Commission believed it would be premature to adopt such specific testing requirements at this time.

**Procedural Matters**

*A. Final Paperwork Reduction Act Analysis*

18. This Second Report and Order adopts a new or revised information collection requirement subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. This requirement will be submitted to the Office of Management and Budget (OMB) for review under section 3507 of the PRA. The Commission also will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this proceeding. The requirement will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirement. In addition, the Commission noted that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), it will seek specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

*B. Report to Congress*

19. The Commission will send a copy of the CMAS Second Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

**Final Regulatory Flexibility Analysis**

20. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in PSHSB Docket 07–287 (CMAS NPRM). The Commission sought written public comments on the proposals in the CMAS NPRM, including comment on the IRFA. Comments on the IRFA were to have been explicitly identified as being in response to the IRFA and were required to be filed by the same deadlines as that established in section IV of the CMAS NPRM for other comments to the CMAS NPRM. The Commission sent a copy of the CMAS NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the CMAS NPRM and IRFA were published in the **Federal Register**. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

21. *Need for, and Objectives of, the Order.* Section 602(c) of the WARN Act requires the Commission to, ''[w]ithin 90 days after the date on which the Commission adopts relevant technical standards based on recommendations of the Commercial Mobile Service Alert Advisory Committee . . . complete a proceeding to require licensees and permittees of noncommercial educational broadcast stations or public broadcast stations (as those terms are defined in section 397(6) of the Communications Act of 1934 (47 U.S.C. 397(6))) to install necessary equipment and technologies on, or as part of, any broadcast television digital signal transmitter to enable the distribution of geographically targeted alerts by commercial mobile service providers that have elected to transmit emergency alerts under this section.'' Although the CMAS NPRM solicited comment on issues related to section 602(a) (CMAS Technical requirements) and 602(b) (CMS provider election to the CMAS), this Second Report and Order only addresses issues raised by sections 602(c) and 602(f) of the WARN Act. Accordingly, this FRFA only addressees the manner in which any commenters to the IRFA addressed the Commission's adoption of rules regarding NCE and public television licensee's installation of digital television transmission towers retransmission equipment, as required by section 602(c) of the WARN Act, and the Commission's adoption of rules for testing the CMAS as required by section 602(f) of the WARN Act.

22. This Second Report and Order adopts further rules necessary to enable CMS alerting capability for CMS providers who elect to transmit emergency alerts to their subscribers. Specifically, the Order adopts rules that require NCE and public television stations to install on, or as part of, any broadcast television digital signal transmitter equipment to enable the distribution of geographically targeted alerts by commercial mobile service providers that have elected to transmit CMAS alerts. This equipment will interface with the CMAS Alert Gateway and enable the transmission of the national CMAS alert feed from the CMAS Alert Gateway to all covered broadcast television digital towers. As the Commission discussed in greater detail below, it is necessary that NCE and public broadcast television stations install this equipment to further enable the distribution of geographically targeted alerts by CMS providers that participate in the CMAS. The installation and operation of this equipment is consistent with the technologically neutral requirements adopted in the CMAS First Report and Order.

23–24. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* There were no comments filed that specifically addressed the IRFA. The only commenter that explicitly identified itself as a small business was Interstate Wireless, Inc., whose comments addressed only the technical requirements and protocols relevant to section 602(a) of the WARN Act. Interstate Wireless Inc.'s comments were addressed in the CMAS First Report and Order.

25. *Description and Estimate of the Number of Small Entities to Which Rules Will Apply.* The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

26. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category. Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new

category, the Commission will estimate small business prevalence using the prior categories and associated data. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, using the prior categories and the available data, the Commission estimates that the majority of wireless firms can be considered small.

27. *Cellular Radiotelephone Service.* As noted, the SBA has developed a small business size standard for small businesses in the category ''Wireless Telecommunications Carriers (except satellite).'' Under that SBA category, a business is small if it has 1,500 or fewer employees. Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category. Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Accordingly, the pertinent data for this category is contained within the prior Wireless Telecommunications Carriers (except Satellite) category. For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, using the prior category and the available data, the Commission estimated that the majority of wireless firms can be considered small.

28. *Auctions.* Initially, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

29. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

30. *Narrowband Personal Communications Service.* The Commission held an auction for narrowband Personal Communications Service (PCS) licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

31. *Wireless Communications Service.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305–2320 MHz and 2345–2360 MHz bands. The Commission defined ''small business'' for the wireless communications service (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

32. *700 MHz Guard Bands Licenses.* In the 700 MHz Guard Bands Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses for each of two spectrum blocks commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of remaining 700 MHz Guard Bands licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses. Subsequently, in the 700 MHz Second Report and Order, the Commission reorganized the

licenses pursuant to an agreement among most of the licensees, resulting in a spectral relocation of the first set of paired spectrum block licenses, and an elimination of the second set of paired spectrum block licenses (many of which were already vacant, reclaimed by the Commission from Nextel). A single licensee that did not participate in the agreement was grandfathered in the initial spectral location for its two licenses in the second set of paired spectrum blocks. Accordingly, at this time there are 54 licenses in the 700 MHz Guard Bands.

33. *700 MHz Band Commercial Licenses.* There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698–757, 758–763, 776–787, and 788–793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) ''Small business,'' which is defined as an entity that has attributed average annual gross revenues that do not exceed $15 million during the preceding three years; and (2) ''very small business,'' which is defined as an entity with attributed average annual gross revenues that do not exceed $40 million for the preceding three years. In Block C of the Lower 700 MHz Band (710–716 MHz and 740–746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: an ''entrepreneur,'' which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards.

34. An auction of 740 licenses for Blocks C (710–716 MHz and 740–746 MHz) and D (716–722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: five EAG licenses and 251 CMA licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

35. The remaining 62 megahertz of commercial spectrum is currently scheduled for auction on January 24, 2008. As explained above, bidding credits for all of these licenses will be available to ''small businesses'' and ''very small businesses.''

36. *Advanced Wireless Services.* In the AWS–1 Report and Order, the Commission adopted rules that affect applicants who wish to provide service in the 1710–1755 MHz and 2110–2155 MHz bands. The Commission did not know precisely the type of service that a licensee in these bands might seek to provide. Nonetheless, the Commission anticipated that the services that will be deployed in these bands may have capital requirements comparable to those in the broadband Personal Communications Service (PCS), and that the licensees in these bands will be presented with issues and costs similar to those presented to broadband PCS licensees. Further, at the time the broadband PCS service was established, it was similarly anticipated that it would facilitate the introduction of a new generation of service. Therefore, the AWS–1 Report and Order adopts the same small business size definition that the Commission adopted for the broadband PCS service and that the SBA approved. In particular, the AWS–1 Report and Order defines a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. The AWS–1 Report and Order also provides small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.

37. *Common Carrier Paging.* As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census category of ''Wireless Telecommunications Carriers (except Satellite).'' Under this category, the SBA deems a business to be small if it has 1,500 or fewer employees. Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category. Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, the Commission estimates small business prevalence using the prior categories and associated data. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, using the prior categories and the available data, the Commission estimates that the majority of wireless firms can be considered small. Thus, under this category, the majority of firms can be considered small.

38. In the Paging Third Report and Order, the Commission developed a small business size standard for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small business size standards. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 365 carriers reported that they were engaged in the provision of paging and messaging services. Of those, the Commission estimates that 360 are small, under the SBA-approved small business size standard.

39. *Wireless Communications Service.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications service (WCS) auction. A ''small business'' is an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. In the

auction, there were seven winning bidders that qualified as ''very small business'' entities, and one that qualified as a ''small business'' entity.

40. *Wireless Communications Equipment Manufacturers.* While these entities are merely indirectly affected by the Commission's action, the Commission described them to achieve a fuller record. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

41. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

42. *Software Publishers.* While these entities are merely indirectly affected by the Commission's action, it is describing them to achieve a fuller record. These companies may design, develop or publish software and may provide other support services to software purchasers, such as providing documentation or assisting in installation. The companies may also design software to meet the needs of specific users. The SBA has developed a small business size standard of $23 million or less in average annual receipts for the category of Software Publishers. For Software Publishers, Census Bureau data for 2002 indicate that there were 6,155 firms in the category that operated for the entire year. Of these, 7,633 had annual receipts of under $10 million, and an additional 403 firms had receipts of between $10 million and $24, 999,999. For providers of Custom Computer Programming Services, the Census Bureau data indicate that there were 32,269 firms that operated for the entire year. Of these, 31,416 had annual receipts of under $10 million, and an additional 565 firms had receipts of between $10 million and $24,999,999. Consequently, the Commission estimates that the majority of the firms in this category are small entities that may be affected by the Commission's action.

43. *NCE and Public Broadcast Stations.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' The SBA has created a small business size standard for Television Broadcasting entities, which is: such firms having $13 million or less in annual receipts. According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States had revenues of $12 (twelve) million or less. The Commission notes, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by the Commission's action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

44. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the Commission's estimates of small businesses to which they apply may be over-inclusive to this extent. There are also 2,117 low power television stations (LPTV). Given the nature of this service, the Commission will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

45. The Commission has, under SBA regulations, estimated the number of licensed NCE television stations to be 380. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by the Commission's action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

46. This Report and Order may contain new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. If the Commission determines that the Report and Order contains collection subject to the PRA, it will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA at an appropriate time. At that time, OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public

Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.

Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

47. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

48. As noted in paragraph 2 above, this Second Report and Order deals only with the WARN Act section 602 (c) requirement that the Commission complete a proceeding to require licensees and permittees of noncommercial educational broadcast stations or public broadcast stations to install necessary equipment and technologies on, or as part of, any broadcast television digital signal transmitter to enable the distribution of geographically targeted alerts by commercial mobile service providers that have elected to transmit emergency alerts under this section.'' Many of the entities affected by this Second Report and Order are the member stations for the Association of Public Broadcasters (APTS), which was a member of the CMSAAC. Further, in its formation of the CMSAAC, the Commission made sure to include representatives of small businesses among the advisory committee members. The CMAS NPRM also sought comment on a number of alternatives to the recommendations of the CMSAAC, such as the Digital EAS. In its consideration of this and other alternatives the CMSAAC recommendations, the Commission has attempted to impose minimal regulation on small entities to the extent consistent with the goal of advancing its public safety mission by adopting technical requirements, standards and protocols for a CMAS that CMS providers would elect to provide alerts and warnings to their customers. The Commission's action in this Second Report and Order neither requires nor forecloses the exact outcome requested by the entities most affected, as represented by APTS.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

49. None.

Report to Congress

50. The Commission will send a copy of the CMAS Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA is also hereby published in the **Federal Register**.

**Ordering Clauses**

51. *It is ordered*, that pursuant to sections 1, 4(i) and (o), 201, 303(r), 403, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), 201, 303(r), 403, and 606, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act, this Second Report and Order *is* hereby *adopted*. The rules adopted in this Second Report and Order shall become effective October 14, 2008, except that § 10.350 (a)(7) and (b) contain new or modified information collection requirements which will not become effective prior to OMB approval.

52. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 10**

Alert and Warning, Commercial Mobile Alert System, noncommercial educational broadcast stations, public broadcast stations.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

**Final Rules**

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR chapter 1 part 10 as follows:

## PART 10—COMMERCIAL MOBILE ALERT SYSTEM

■ 1. The authority citation for part 10 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i) and (o), 201, 303(r), 403, and 606, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act.

■ 2. Add a new § 10.340 to subpart C to read as follows:

### § 10.340 Digital Television Transmission Towers Retransmission Capability.

Licensees and permittees of noncommercial educational broadcast television stations (NCE) or public broadcast television stations (to the extent such stations fall within the scope of those terms as defined in section 397(6) of the Communications Act of 1934 (47 U.S.C. 397(6))) are required to install on, or as part of, any broadcast television digital signal transmitter, equipment to enable the distribution of geographically targeted alerts by commercial mobile service providers that have elected to transmit CMAS alerts. Such equipment and technologies must have the capability of allowing licensees and permittees of NCE and public broadcast television stations to receive CMAS alerts from the Alert Gateway over an alternate, secure interface and then to transmit such CMAS alerts to CMS Provider Gateways of participating CMS providers. This equipment must be installed no later than eighteen months from the date of receipt of funding permitted under section 606(b) of the WARN Act or 18 months from the effective date of these rules, whichever is later.

■ 3. Add a new § 10.350 to subpart C to read as follows:

### § 10.350 CMAS Testing Requirements.

This section specifies the testing that will be required, no later than the date of deployment of the CMAS, of CMAS components.

(a) *Required Monthly Tests.* Testing of the CMAS from the Federal Alert Gateway to each Participating CMS Provider's infrastructure shall be conducted monthly.

(1) A Participating CMS Provider's Gateway shall support the ability to receive a required monthly test (RMT) message initiated by the Federal Alert Gateway Administrator.

(2) Participating CMS Providers shall schedule the distribution of the RMT to their CMAS coverage area over a 24 hour period commencing upon receipt of the RMT at the CMS Provider Gateway. Participating CMS Providers shall determine the method to distribute the RMTs, and may schedule over the 24 hour period the delivery of RMTs over geographic subsets of their coverage area to manage traffic loads and to accommodate maintenance windows.

(3) A Participating CMS Provider may forego an RMT if the RMT is pre-empted by actual alert traffic or if an unforeseen condition in the CMS Provider infrastructure precludes distribution of the RMT. A Participating CMS Provider Gateway shall indicate such an unforeseen condition by a response code to the Federal Alert Gateway.

(4) The RMT shall be initiated only by the Federal Alert Gateway Administrator using a defined test message. Real event codes or alert messages shall not be used for the CMAS RMT message.

(5) A Participating CMS Provider shall distribute an RMT within its CMAS coverage area within 24 hours of receipt by the CMS Provider Gateway unless pre-empted by actual alert traffic or unable due to an unforeseen condition.

(6) A Participating CMS Provider may provide mobile devices with the capability of receiving RMT messages.

(7) A Participating CMS Provider must retain an automated log of RMT messages received by the CMS Provider Gateway from the Federal Alert Gateway.

(b) *Periodic C Interface Testing.* In addition to the required monthly tests, a Participating CMS Provider must participate in periodic testing of the interface between the Federal Alert Gateway and its CMS Provider Gateway. This periodic interface testing is not intended to test the CMS Provider's infrastructure nor the mobile devices but rather is required to ensure the availability/viability of both gateway functions. Each CMS Provider Gateway shall send an acknowledgement to the Federal Alert Gateway upon receipt of such an interface test message. Real event codes or alert messages shall not be used for this periodic interface testing.

[FR Doc. E8–18144 Filed 8–13–08; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 071106673–8011–02]**

**RIN 0648–XJ59**

## Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Atka Mackerel in the Bering Sea and Aleutian Islands Management Area; Correction

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; correction.

**SUMMARY:** On July 30, 2008, NMFS published a revised Table 4 that reallocated Atka mackerel from the 2008 incidental catch allowance to the B season allowance for the Amendment 80 cooperative in the Eastern Aleutian District and the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). Table 4 of that document contains the final 2008 and 2009 BSAI Atka mackerel allocations. That table contained inadvertent calculation errors that are corrected in this rule.

**DATES:** Effective August 14, 2008, through 2400 hrs, A.l.t., December 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mary Furuness, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** Federal regulations at 50 CFR part 679 implement the Fishery Management Plan (FMP) and govern the groundfish fisheries in the BSAI. The North Pacific Fishery Management Council (Council) prepared the FMP, and NMFS approved it under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). General regulations governing U.S. fisheries also appear at 50 CFR part 600.

On July 30, 2008 (73 FR 44173) NMFS published a revised Table 4 that reallocated Atka mackerel from the 2008 incidental catch allowance to the B season allowance for the Amendment 80 cooperative in the Eastern Aleutian District and the Bering Sea subarea of the BSAI. However, NMFS inadvertently miscalculated the 2008 Amendment 80 Cooperatives total amount as 8,804 metric tons (mt) instead of 8,683 mt and A season amount as 3,812 mt instead of 3,691 mt. NMFS also inadvertently miscalculated the 2009 Amendment 80 sectors amounts in the Eastern Aleutian District and Bering Sea area and the Central Aleutian District. This document corrects the errors and republishes Table 4 in its entirety.

### Correction

Accordingly, the revised Table 4 from the temporary rule (FR Doc. E8–17466) published on July 30, 2008, at 73 FR 44173, is corrected as follows:

On page 44174, Table 4, is corrected and republished in its entirety to read as follows:

TABLE 4—2008 AND 2009 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

| Sector[1] | Season[2,3] | 2008 allocation by area | | | 2009 allocation by area | | |
|---|---|---|---|---|---|---|---|
| | | Eastern Aleutian District/ Bering Sea | Central Aleutian District | Western Aleutian District | Eastern Aleutian District/ Bering Sea | Central Aleutian District | Western Aleutian District |
| TAC | n/a | 19,500 | 24,300 | 16,900 | 15,300 | 19,000 | 13,200 |
| CDQ reserve | Total | 2,087 | 2,600 | 1,808 | 1,637 | 2,033 | 1,412 |
| | HLA[4] | n/a | 1,560 | 1,085 | n/a | 1,220 | 847 |
| ICA | Total | 100 | 10 | 10 | 1,400 | 10 | 10 |
| Jig[5] | Total | 80 | 0 | 0 | 61 | 0 | 0 |
| BSAI trawl limited access | Total | 319 | 434 | 0 | 488 | 678 | 0 |

TABLE 4—2008 AND 2009 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC—Continued

[Amounts are in metric tons]

| Sector[1] | Season[2,3] | 2008 allocation by area | | | 2009 allocation by area | | |
|---|---|---|---|---|---|---|---|
| | | Eastern Aleutian District/ Bering Sea | Central Aleutian District | Western Aleutian District | Eastern Aleutian District/ Bering Sea | Central Aleutian District | Western Aleutian District |
| | A | 159 | 217 | 0 | 244 | 339 | 0 |
| | HLA[4] | n/a | 130 | 0 | n/a | 203 | 0 |
| | B | 159 | 217 | 0 | 244 | 339 | 0 |
| | HLA[4] | n/a | 130 | 0 | n/a | 203 | 0 |
| Amendment 80 sectors | Total | 15,615 | 21,256 | 15,082 | 11,714 | 16,279 | 11,778 |
| | A | 7,807 | 10,628 | 7,541 | 5,857 | 8,139 | 5,889 |
| | HLA[4] | n/a | 6,377 | 4,525 | n/a | 4,884 | 3,533 |
| | B | 7,807 | 10,628 | 7,541 | 5,857 | 8,139 | 5,889 |
| | HLA[4] | n/a | 6,377 | 4,525 | n/a | 4,884 | 3,533 |
| Amendment 80 limited access | Total | 8,232 | 12,809 | 9,298 | n/a | n/a | n/a |
| | A | 4,116 | 6,405 | 4,649 | n/a | n/a | n/a |
| | HLA[4] | n/a | 3,843 | 2,789 | n/a | n/a | n/a |
| | B | 4,116 | 6,405 | 4,649 | n/a | n/a | n/a |
| | HLA[4] | n/a | 3,843 | 2,789 | n/a | n/a | n/a |
| Amendment 80 cooperatives | Total | 8,683 | 8,447 | 5,784 | n/a | n/a | n/a |
| | A | 3,691 | 4,224 | 2,892 | n/a | n/a | n/a |
| | HLA[4] | n/a | 2,534 | 1,735 | n/a | n/a | n/a |
| | B | 4,992 | 4,224 | 2,892 | n/a | n/a | n/a |
| | HLA[4] | n/a | 2,534 | 1,735 | n/a | n/a | n/a |

[1]Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtraction of the CDQ reserves, jig gear allocation, and ICAs, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31).

[2]Regulations at §§ 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery. The A season is January 1 (January 20 for trawl gear) to April 15 and the B season is September 1 to November 1.

[3]The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

[4]Harvest Limit Area (HLA) limit refers to the amount of each seasonal allowance that is available for fishing inside the HLA (see § 679.2). In 2008 and 2009, 60 percent of each seasonal allowance is available for fishing inside the HLA in the Western and Central Aleutian Districts.

[5]Section 679.20(a)(8)(i) requires that up to 2 percent of the Eastern Aleutian District and the Bering Sea subarea TAC be allocated to jig gear after subtraction of the CDQ reserve and ICA. The amount of this allocation is 0.5 percent. The jig gear allocation is not apportioned by season.

Dated: August 8, 2008.

**Alan D. Risenhoover**

*Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–18857 Filed 8–13–08; 8:45 am]

**BILLING CODE 3510–22–S**

# Proposed Rules

Federal Register
Vol. 73, No. 158
Thursday, August 14, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–0589; Directorate Identifier 2008–NE–17–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Pratt & Whitney (P&W) PW4000 Series 94-Inch Fan Turbofan Engines

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for P&W PW4052, PW4056, PW4060, PW4062, PW4152, PW4156A, PW4158, PW4460, and PW4462 turbofan engines. This proposed AD would require a onetime visual inspection of all EEC–131 model electronic engine controls (EECs). This proposed AD would require the EECs to be identified, categorized by group number, marked, and replaced using a fleet management plan. This proposed AD results from a report of an uncommanded engine in-flight shutdown due to defective EEC pulse width modulator (PWM) microcircuits. We are proposing this AD to prevent uncommanded in-flight engine shutdowns which could result in loss of thrust and prevent continued safe flight or landing.

**DATES:** We must receive any comments on this proposed AD by September 15, 2008.

**ADDRESSES:** Use one of the following addresses to comment on this proposed AD.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

You can get the service information identified in this proposed AD from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770; fax (860) 565–4503.

**FOR FURTHER INFORMATION CONTACT:** V. Rose Len, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *rose.len@faa.gov*; telephone (781) 238–7772; fax (781) 238–7199.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2008–0589; Directorate Identifier 2008-NE–17–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

### Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

### Discussion

In May of 2006 we received a report of an uncommanded engine in-flight shutdown of a P&W PW4152 turbofan engine. The investigation of this event determined that certain EECs were built with defective PWM microcircuits. The defective microcircuits degrade over time as a result of thermal cycling while operating within their certified temperature range. In operation, the EEC system tests the functional capability of the PWM in Channel A. If the Channel A PWM fails the test, the EEC automatically switches to the Channel B PWM. In this case, both of the EEC PWMs are degrading similarly and the Channel B PWM is also likely to fail, at which time the EEC automatically shuts down the engine. Based on a risk analysis provided by P&W which we reviewed and concurred, this condition, if not corrected, could result in uncommanded in-flight engine shutdowns, which could result in loss of thrust and prevent continued safe flight or landing.

The defective PWMs are the result of a change from the original PWM design introduced by a single microcircuit supplier before 1993. Our investigation showed that the supplier returned to the original PWM design between 1993 and 1994. The EEC supplier determined the population of affected EECs by testing model EEC–131 EECs built after the introduction of the PWM design change. The EEC supplier performed destructive testing of the PWMs, and identified four distinct groups of EECs by serial number:

*Group 1:* EECs with a high concentration of PWMs that failed during testing.

*Group 2:* EECs with a low concentration of PWMs that failed during testing.

*Group 3:* All EECs not in Group 1 or Group 2 but may contain suspect PWMs due to board swapping during the repair or refurbishment of the EEC.

*Group 4:* EECs have been inspected for defective PWMs and repaired if required.

To facilitate the timely removal of the defective PWMs from the fleet, all of the EECs must first be identified, categorized, and marked by their group number so that the higher risk EECs will be replaced before the lower risk EECs are replaced. Group 4 EECs have been inspected or repaired, so they are not subject to the same PWM problem. However, they still require further internal and external labeling for tracking purposes. Labeling will be done using P&W Alert Service Bulletin (ASB) No. PW4ENG 73–216, dated April 8, 2008.

**Relevant Service Information**

We have reviewed and approved the technical contents of P&W ASB No. PW4ENG A73–214, Revision 2, dated May 23, 2008. That ASB describes procedures for inspecting, identifying, categorizing, and marking all EEC–131 model EECs that are identified by part number and serial number into four groups. The Group 1 EECs have a high probability of having defective PWM microcircuits, while the other groups have a lower probability of having defective PWM microcircuits.

**FAA's Determination and Requirements of the Proposed AD**

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require a onetime visual inspection of all EEC–131 model EECs. The proposed AD would also require the EECs to be identified, categorized by group number, marked, and replaced using a fleet management plan. The proposed AD would require you to use the service information described previously to perform these actions.

**Costs of Compliance**

We estimate that this proposed AD would affect 730 P&W PW4000 series 94-inch fan turbofan engines installed on airplanes of U.S. registry. We also estimate that it would take about 1 work-hour per engine to inspect, categorize, and mark each of the 730 EECs, and 1 work-hour per engine to replace up to 730 EECs. The average labor rate is $80 per work-hour. Required replacement parts would cost about $400 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $467,200.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. You may get a copy of this summary at the address listed under **ADDRESSES**.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

Under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

**Pratt & Whitney:** Docket No. FAA–2008–0589; Directorate Identifier 2008–NE–17–AD.

**Comments Due Date**

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by September 15, 2008.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Pratt & Whitney (P&W) PW4052, PW4056, PW4060, PW4062, PW4152, PW4156A, PW4158, PW4460, and PW4462 turbofan engines. These engines are installed on, but not limited to, Airbus A300–600 and A310–300, and Boeing 747–400, Boeing 767–200, 767–300, and MD–11 series airplanes.

**Unsafe Condition**

(d) This AD results from a report of an uncommanded engine in-flight shutdown due to defective electronic engine control (EEC) pulse width modulator (PWM) microcircuits. We are issuing this AD to prevent uncommanded in-flight engine shutdowns which could result in loss of thrust and prevent continued safe flight or landing.

**Compliance**

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

**Onetime Visual Inspection and Reporting Requirements**

(f) Within 600 operating hours after the effective date of this AD:

(1) Perform a onetime visual inspection of the EEC–131 model EECs to identify, categorize, and mark them as a Group 1, Group 2, Group 3, or Group 4 EEC.

(2) Use paragraphs 1 through 7 in the Accomplishment Instructions of P&W Alert Service Bulletin No. PW4ENG A73–214, Revision 2, dated May 23, 2008, to inspect, categorize, and mark the EECs.

(3) Within 30 calendar days of completing paragraph (f)(1) of this AD, report all inspection findings to V. Rose Len, Engine Certification Office, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803.

(4) The Office of Management and Budget (OMB) has approved the reporting requirements and assigned OMB control number 2120–0056.

**Replacement of Group 1 EECs**

(g) Replace Group 1 EECs with a serviceable EEC before reaching 2,000 cycles-in-service (CIS) since new, but not later than one year from the effective date of this AD.

**Replacement of Groups 2, 3, and 4 EECs**

(h) Replace the following groups of EECs with a serviceable EEC, or any EEC that does not violate the EEC installation procedure as provided by paragraphs (k), (l), and (m) of this AD, as follows:

(1) Group 2 EECs, before reaching 4,000 CIS since new, but not later than 2 years after the effective date of this AD.

(2) Group 3 EECs, before reaching 14,000 CIS since new, but not later than 6 years after the effective date of this AD.

**Definition of Serviceable EECs**

(i) A serviceable EEC is an EEC that does not violate the EEC installation procedure as provided by paragraphs (k), (l), and (m) of this AD, or is marked as Group 4 per P&W ASB No. PW4ENG 73–214, Revision 2, dated May 23, 2008, or has been repaired per P&W Service Bulletin (SB) No. PW4ENG 73–216, dated April 8, 2008. Once an EEC has been repaired, it is viewed as a Group 4 EEC.

(j) Information on obtaining a serviceable EEC can be found in P&W SB No. PW4ENG 73–216, dated April 8, 2008.

**EEC Installation Prohibition**

(k) Do not install any Group 1 EEC after 1 year from the effective date of this AD or any Group 1 EEC that has reached 2,000 CIS since new.

(l) Do not install any Group 2 EEC after 2 years from the effective date of this AD or any Group 2 EEC that has reached 4,000 CIS since new.

(m) Do not install any Group 3 EEC after 6 years from the effective date of this AD or any Group 3 EEC that has reached 14,000 CIS since new.

**Alternative Methods of Compliance**

(n) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

**Related Information**

(o) Contact V. Rose Len, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *rose.len@faa.gov;* telephone (781) 238–7772; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on August 8, 2008.

**Peter A. White,**

*Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.*

[FR Doc. E8–18811 Filed 8–13–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–103146–08]**

**RIN 1545–BH69**

## Information Reporting Requirements Under Internal Revenue Code Section 6039; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correction to notice of proposed rulemaking.

**SUMMARY:** This document contains corrections to a notice of proposed rulemaking (REG–103146–08) that was published in the **Federal Register** on Thursday, July 17, 2008 (73 FR 40999) relating to the return and information statement requirements under section 6039 of the Internal Revenue Code. These regulations reflect changes to section 6039 made by section 403 of the Tax Relief and Health Care Act of 2006. These proposed regulations affect corporations that issue statutory stock options and provide guidance to assist corporations in complying with the return and information statement requirements under section 6039.

**FOR FURTHER INFORMATION CONTACT:** Thomas Scholz, (202) 622–6030 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Background

The correction notice that is the subject of this document is under section 6039 of the Internal Revenue Code.

### Need for Correction

As published, the notice of proposed rulemaking (REG–103146–08) contains errors that may prove to be misleading and are in need of clarification.

### Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking (REG–103146–08), which was the subject of FR Doc. E8–16177, is corrected as follows:

**§ 1.6039–1 [Corrected]**

1. On page 41002, column 2, § 1.6039–1(a)(1), line 5 of the column, the language ''a return with respect each transfer made'' is corrected to read ''a return with respect to each transfer made''.

2. On page 41002, column 2, § 1.6039–1(b)(1), line 12, the language ''calendar year, file a return with respect'' is corrected to read ''calendar year, file a return with respect to''.

3. On page 41002, column 2, § 1.6039–1(b)(1)(iv), the language ''The fair market value of the stock on the date the option was granted;'' is corrected to read ''The fair market value of a share of stock on the date the option was granted;''.

4. On page 41002, column 3, § 1.6039–1(b)(1)(vii), the language ''The fair market value of the stock on the date the option was exercised by the transferor;'' is corrected to read ''The fair market value of a share of stock on the date the option was exercised by the transferor;''.

**§ 1.6039–2 [Corrected]**

5. On page 41003, column 1, § 1.6039–2(b), line 4, the language ''*section 6039(a)(2).* (1) Every corporation'' is corrected to read ''section 6039(b). (1) Every corporation''.

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. E8–18784 Filed 8–13–08; 8:45 am]

**BILLING CODE 4830–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–R09–OAR–2008–0555; FRL–8701–6]**

## Delegation of National Emission Standards for Hazardous Air Pollutants for Source Categories; State of Arizona, Arizona Department of Environmental Quality, Pima County Department of Environmental Quality

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Pursuant to section 112(l) of the 1990 Clean Air Act, EPA granted delegation of specific national emission standards for hazardous air pollutants (NESHAP) to the Arizona Department of Environmental Quality on June 4, 2008, and to the Pima County Department of Environmental Quality on June 16, 2008. EPA is proposing to revise the Code of Federal Regulations to reflect the current delegation status of NESHAP in Arizona.

**DATES:** Any comments on this proposal must arrive by September 15, 2008.

**ADDRESSES:** Submit comments, identified by docket number EPA–R09–OAR–2008–0555, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (AIR–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or e-mail. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

*Docket:* The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Mae Wang, EPA Region IX, (415) 947–4124, *wang.mae@epa.gov.*

**SUPPLEMENTARY INFORMATION:** This document concerns the delegation of unchanged NESHAP to the Arizona Department of Environmental Quality and the Pima County Department of Environmental Quality. In the Rules and Regulations section of this **Federal Register**, EPA is amending regulations to reflect the current delegation status of NESHAP in Arizona. EPA is taking direct final action without prior proposal because the Agency believes this action is not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

**Authority:** This action is issued under the authority of Section 112 of the Clean Air Act, as amended, 42 U.S.C. 7412.

Dated: July 25, 2008.

**Amy Zimpfer,**

*Acting Director, Air Division, Region IX.*

[FR Doc. E8–18747 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## LEGAL SERVICES CORPORATION

### 45 CFR Part 1602

### Procedures for Disclosure of Information Under the Freedom of Information Act

**AGENCY:** Legal Services Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** LSC is proposing a number of revisions to its regulations on procedures for disclosure of information under the Freedom of Information Act to implement changes in that law made by the OPEN Government Act of 2007. LSC is also proposing to designate the Office of Inspector General as a separate component for receiving requests for its records and to make two technical amendments.

**DATES:** Comments on this NPRM are due on September 15, 2008.

**ADDRESSES:** Written comments may be submitted by mail, fax or e-mail to Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; 202–295–1624 (phone); 202–337–6519 (fax); *mcohan@lsc.gov* (e-mail).

**FOR FURTHER INFORMATION CONTACT:** Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; 202–295–1624 (phone); 202–337–6519 (fax); *mcohan@lsc.gov* (e-mail).

**SUPPLEMENTARY INFORMATION:** LSC is subject to the Freedom of Information Act (FOIA) by the terms of the Legal Services Corporation Act. 42 U.S.C. 2996d(g).[1] LSC has implemented FOIA procedures through the adoption of regulations found at 45 CFR Part 1602.

On December 31, 2007, President Bush signed the Openness Promotes Effectiveness in our National Government Act of 2007 (''OPEN Government Act'' or ''Act'') into law. The OPEN Government Act amends FOIA in an effort to improve media and public access to government records. In order to bring LSC's FOIA regulations into conformance with the changes to FOIA made by the OPEN Government Act provisions, the LSC Board of Directors initiated a rulemaking on August 2, 2008 and approved this Notice of Proposed Rulemaking (NPRM) for publication. The proposed changes to Part 1602 are discussed in greater detail below.

**Section-by-Section Analysis**

*Definitions—45 CFR 1602.2*

§ 1602.2(g)—Records

Under LSC's regulations, ''records'' are various materials ''made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation.'' 45 CFR 1602.2(g). Section 9 of the OPEN Government Act expands the statutory definition of ''record'' to include any information that is maintained for an agency by an entity under Government contract, for the purposes of records management. LSC proposes to amend § 1602.2(g) to include conform the regulation with the expanded statutory definition to specifically reference information maintained by LSC under contract for the purposes of records management. Accordingly, LSC proposes to revise § 1602.2(g) to read ''Records means books, papers, maps, photographs, or other documentary materials, regardless of whether the format is physical or electronic, made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation (either directly or maintained by a third party under contract to the Corporation) for records management purposes, as evidence of the organization, functions, policies, decisions procedures, operations, or other activities of the Corporation, or because of the informational value of data in them. The term does not include, inter alia, books, magazines, or

[1] Absent this authority, LSC would not otherwise be subject to FOIA since LSC is not an agency, department or instrumentality of the Federal government. 42 U.S.C. 2996d(e)(1).

other materials acquired solely for library purposes.''

§ 1602.2(h)—Representatives of News Media

FOIA provides that ''representatives of the news media'' may not be charged fees for search and review time associated with responding to their FOIA requests. 5 U.S.C. 552(a)(4)(A)(ii)(II). The term ''representative of the news media'' is not defined in FOIA, but LSC's FOIA regulation at Part 1602 currently defines ''representative of the news media'' as ''any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of ''freelance'' journalists, they will be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.'' 45 CFR 1602.2(h). This definition is based on a definition of that term appearing in guidance published by the Office of Management and Budget. *See,* 53 FR 6151 (March 1, 1988); 52 F 10012 (March 27, 1987).

The OPEN Government Act of 2007 clarifies that ''freelance'' journalists and ''alternative media'' news sources (such as online news sources) are ''representatives of the news media'' for the purposes of the fee structure. Specifically, section 3 of the OPEN Government Act defines ''representative of the news media'' as ''any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.'' That section goes on to provide:

> In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

Although LSC's existing definition of ''representative of the news media'' is not substantively inconsistent with or contrary to the newly clarified definition in the OPEN Government Act, LSC believes that it is prudent to amend its regulatory definition to reflect the revised statutory language. LSC believes that substituting the clarified definition for the existing one will ensure that LSC's regulation reflects the full intent of Congress. Accordingly, LSC proposes to amend § 1602.2(h) to read ''Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Corporation may also consider the past publication record of the requester in making such a determination.''

*Requests for Records—45 CFR 1602.8*

Agencies are required to make determinations on whether to comply with FOIA requests within twenty (20) business days of receipt of a request. 5 U.S.C 552(a)(6)(A)(i). LSC has incorporated this requirement into its regulations at 45 CFR 1602.8(i). The OPEN Government Act provides additional instruction to clarify when the time limit begins to run. Specifically, § 6 of the OPEN Government Act provides that:

> The 20-day period under clause [5 U.S.C 552(a)(6)(A)(i)] shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. [sic] The 20-day period shall not be tolled by the agency except:
>
> (I) That the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or
>
> (II) If necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

Unlike some agencies subject to FOIA, LSC has had only one component designated to receive requests, the Office of Legal Affairs. The Office of Inspector General (OIG) is not a separate component designated to receive FOIA requests under LSC's regulations, although the General Counsel or designee forwards requests for records maintained by the OIG for processing and response. Under the current regulation, when FOIA requests are for OIG records and they are referred over to the OIG, the 20-day time limit for response only starts for the OIG when the OIG receives the request upon referral from the Office of Legal Affairs. However, under the new statutory requirements, the OIG's 20-day time limit will commence when the OIG receives the request from the Office of Legal Affairs, but in no event later than 10 working days from when the Office of Legal Affairs receives the request. Thus, if for some reason the referral is not made on a timely basis, the OIG could lose some or all of its response time before its response would be deemed late through no action on inaction on the part of the OIG.

Designating the OIG as a separate component authorized to receive

requests directly would ameliorate, although not entirely eliminate, this potential problem. In addition, LSC notes that it is typical practice in other agencies with Inspectors General for those Offices of Inspector General to be separately designated components authorized to receive and process FOIA request directly. Accordingly, LSC proposes to amend 45 CFR Part 1602.8(i) to incorporate the provisions of the OPEN Government Act discussed above and to designate the Office of Inspector General as a component authorized to receive FOIA requests for its records. Specifically, LSC proposes to redesignate paragraph (i)(1) as (i)(1)(i) to read as follows ''The General Counsel or designee, upon request for any records made in accordance with this section, except in the case of a request for Office of Inspector General records, shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.'' LSC also proposed to add a new paragraph (i)(1)(ii) to read as follows ''In the case of a request for any Office of Inspector General records made in accordance with this section, the Counsel to the Inspector General or designee shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.''

In addition, LSC is proposing to redesignate paragraph (i)(2) as (i)(2)(i), amend that paragraph to read as follows: ''If the General Counsel or designee determines that a request or portion thereof is for the Office of Inspector General records, the General Counsel or designee shall promptly refer the request or portion thereof to the Office of Inspector General and send notice of such referral to the requester. If the Counsel to the Inspector General or designee determines that a request or portion thereof is for Corporation records not maintained by the Office of Inspector General, the Counsel to the Inspector General or designee shall promptly refer the request or portion thereof to the Office of Legal Affairs and send notice of such referral to the requester.'' LSC also proposes to and add a new paragraph (i)(2)(ii) to read as follows ''The 20-day period under paragraph (i)(1) shall commence on the date on which the request is first received by the appropriate Office (the Office of Legal Affairs or the Office of Inspector General), but in no event later than 10 working days after the request has been received by either the Office of Legal Affairs or the Office of Inspector General. The 20-day period shall not be tolled by the Office processing the request except that the processing Office may make one request to the requester for information pursuant to paragraph (c) of this section and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or, if necessary to clarify with the requester issues regarding fee assessment. In either case, the processing Office's receipt of the requester's response to such a request for information or clarification ends the tolling period.''

*Exemptions for Withholding Records—45 CFR 1602.9*

Under FOIA, entire documents or portions thereof may be withheld from disclosure if one or more specified exemptions apply. 5 U.S.C. 552(b). If a particular document contains information that can be withheld from disclosure which may reasonably be segregated from the material which must be released, the agency must (with limited exception) release the segregable portion of the record and indicate the amount of information which has been deleted. *Id.* Section 12 of the OPEN Government Act imposes a further requirement that the agency inform requesters of the exemption under which redacted information is being withheld. LSC proposes incorporating this new requirement into its regulations by amending § 1602.9(b) to insert the words ''and the exemption under which the deletion is made'' after the words ''amount of information deleted'' where they appear in the second and third sentences of that paragraph. As proposed, § 1602.9(b) would read as follows ''In the event that one or more of the exemptions in paragraph (a) of this section apply, any reasonably segregable portion of a record shall be provided to the requester after deletion of the portions that are exempt. The amount of information deleted and the exemption under which the deletion is being made shall be indicated on the released portion of the record, unless doing so would harm the interest protected by the exemption under which the deletion is made. If technically feasible, the amount of information deleted and the exemption under which the deletion is being made shall be indicated at the place in the record where the deletion occurs''

**Officials Authorized to Grant or Deny Requests for Records—45 CFR 1602.10**

Under the current regulation, because the OIG is not separately designated to receive its own FOIA requests, the Counsel to the Inspector General or designee is required to consult with the Office of the General Counsel prior to granting or denying requests for records which have been referred to the OIG. 45 CFR 1602.10(b). With the proposed changed, discussed elsewhere herein, to designate the OIG as a unit authorized to receive FOIA requests directly, this requirement is obsolete. Accordingly, LSC is proposing to delete this requirement from the regulation by deleting the last sentence of § 1602.10(b).

In addition, under the current regulation, the Office of the General Counsel is required to consult with the OIG in cases in which a requester has requested a record which originated with the OIG but which is now maintained elsewhere within the Corporation. 45 CFR 1602.10(b). This ensures that the OIG has notice and an opportunity to participate in the potential release of OIG records by the Office of General Counsel. With the proposed change, discussed elsewhere herein, to designate the OIG as a unit to receive FOIA requests directly, it is appropriate to adopt a parallel provision requiring the OIG to consult with the Office of the General Counsel prior to granting or denying a request for a record which originated in a component of the Corporation other than the OIG but which is being maintained by the OIG. Accordingly, LSC proposes to add the following language as a new last sentence of § 1602.10(b) ''The Counsel to the Inspector General or designee shall consult with the Office of the General Counsel prior to granting or denying any request for records or portions of records which originated with any component of the Corporation other than the Office of Inspector General, or which contain information which originated with a component of the Corporation other than the Office of Inspector General, but which are

maintained by the Office of Inspector General.''

*Fees—45 CFR 1602.13*

FOIA provides for the assessment of fees on requesters associated with the processing of their FOIA requests. 5 U.S.C. 552(a)(4). Prior to the adoption of the OPEN Government Act, applicable fees could be assessed when authorized under FOIA, regardless of the timeliness of the response to the requester. Section 6 of the OPEN Government Act has changed that, providing now that an agency which fails to provide a timely response may not assess search fees on requesters, except in cases involving unusual or exceptional circumstances. In the case of requesters who are representatives of the news media, since they are already not subject to search charges, the OPEN Government Act provides that applicable duplication fees will not be charged when the agency provides an untimely response. LSC proposes to implement this statutory change by amending § 1602.13, Fees, by redesignating paragraph (b) as a paragraph (b)(1) and adding a new paragraph (b)(2) to read as follows ''If no unusual circumstances, as set forth in § 1602.8 apply, if LSC has failed to comply with the time limits set forth in that section, otherwise applicable search fees will not be charged to a requester. In the case of a requester who is a representative of the news media, otherwise applicable duplication fees will not be charged.''

*Technical Changes—References to LSC's Address*

Although not required by the OPEN Government Act, LSC is taking this opportunity to propose two technical changes to the regulation, both referencing addresses for the submission of FOIA requests.

Public Reading Room (§ 1602.5)

When the Corporation last amended Part 1602 in 2003, the Corporation was in the process of moving its offices from 750 First St. NE., Washington, DC to its current location at 3333 K St., NW. Washington, DC Section 1602.5, which sets forth the address of LSC's public reading room and is also the address referenced in the instructions for the submission of FOIA requests in § 1602.8(b), was amended at that time to include both addresses. The reference to the First St. NE. address is now obsolete. Accordingly, LSC is proposing to delete the reference to that obsolete address and amend the first sentence of § 1602.5(a) to read as follows: ''The Corporation will maintain a public reading room at its office at 3333 K St., NW., Washington, DC 20007.'' As proposed, the rest of that paragraph will remain unchanged.

Requests for Records (§ 1602.8)

LSC is proposing a technical change to § 1602.8(b) to update the e-mail address requesters are required to use to submit FOIA requests. The current regulation lists an e-mail address of *info@smtp.lsc.gov,* which is a general information e-mail address. LSC has since established a dedicated FOIA e-mail address to ensure that FOIA requests are identified and processed separately from other general information requests submitted to the Corporation in order to improve handling and processing of FOIA requests. Accordingly, LSC is proposing to amend paragraph (b) to delete the old e-mail address, and substitute the correct dedicated FOIA e-mail address: *FOIA@lsc.gov* in the third sentence of paragraph (b). As proposed, the rest of paragraph (b) would remain unchanged.

**List of Subjects in 45 CFR Part 1602**

Freedom of information, Reporting and recordkeeping requirements.

For reasons set forth above, LSC proposes to amend 45 CFR part 1602 as follows:

## PART 1602—PROCEDURES FOR DISCLOSURE OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

1. The authority citation for part 1602 continues to read as follows:

**Authority:** 42 U.S.C. 2996d(g); 5 U.S.C. 552.

2. Paragraphs (g) and (h) of § 1602.2 are revised to read as follows:

### § 1602.2 Definitions.

* * * * *

(g) *Records* means books, papers, maps, photographs, or other documentary materials, regardless of whether the format is physical or electronic, made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation (either directly or maintained by a third party under contract to the Corporation for records management purposes), as evidence of the organization, functions, policies, decisions procedures, operations, or other activities of the Corporation, or because of the informational value of data in them. The term does not include, inter alia, books, magazines, or other materials acquired solely for library purposes.

(h) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Corporation may also consider the past publication record of the requester in making such a determination.

* * * * *

3. Paragraph (a) of § 1602.5 is revised to read as follows:

### § 1602.5 Public reading room.

(a) The Corporation will maintain a public reading room its office at 3333 K St., NW., Washington, DC 20007. This room will be supervised and will be open to the public during the regular business hours of the Corporation for inspecting and copying records described in paragraph (b) of this section.

* * * * *

4. Paragraph (b) and paragraphs (i)(1) and (2) of § 1602.8 are revised to read as follows:

### § 1602.8 Requests for records.

* * * * *

(b) Requests. Requests for records under this section shall be made in writing, with the envelope and the letter or e-mail request clearly marked Freedom of Information Act Request. All such requests shall be addressed to the Corporation's Office of Legal Affairs or, in the case of requests for records maintained by the Office of Inspector General, to the Office of Inspector General. Requests by letter shall use the address given in § 1602.5(a). E-mail

requests shall be addressed to *FOIA@lsc.gov or*, in the case of requests for records maintained by the Office of Inspector General, *FOIA@oig.lsc.gov*. Any request not marked and addressed as specified in this paragraph will be so marked by Corporation personnel as soon as it is properly identified, and will be forwarded immediately to the Office of Legal Affairs, or as appropriate, the Office of Inspector General. A request improperly addressed will only be deemed to have been received as in accordance with paragraph (i) of this section. Upon receipt of an improperly addressed request, the General Counsel or designee (or Counsel to the Inspector General or designee) shall notify the requester of the date on which the time period began.

* * * * *

(i)(1)(i) The General Counsel or designee, upon request for any records made in accordance with this section, except in the case of a request for Office of Inspector General records, shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(ii) In the case of a request for any Office of Inspector General records made in accordance with this section, the Counsel to the Inspector General or designee shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(2)(i) If the General Counsel or designee determines that a request or portion thereof is for the Office of Inspector General records, the General Counsel or designee shall promptly refer the request or portion thereof to the Office of Inspector General and send notice of such referral to the requester. If the Counsel to the Inspector General or designee determines that a request or portion thereof is for Corporation records not maintained by the Office of Inspector General, the Counsel to the Inspector General or designee shall promptly refer the request or portion thereof to the Office of Legal Affairs and send notice of such referral to the requester.

(ii) The 20-day period under paragraph (i)(1) of this section shall commence on the date on which the request is first received by the appropriate Office (the Office of Legal Affairs or the Office of Inspector General), but in no event later than 10 working days after the request has been received by either the Office of Legal Affairs or the Office of Inspector General. The 20-day period shall not be tolled by the Office processing the request except that the processing Office may make one request to the requester for information pursuant to paragraph (c) of this section and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or, if necessary to clarify with the requester issues regarding fee assessment. In either case, the processing Office's receipt of the requester's response to such a request for information or clarification ends the tolling period.

* * * * *

5. Paragraph (b) of § 1602.9 is revised to read as follows:

**§ 1602.9 Exemptions for withholding records.**

* * * * *

(b) In the event that one or more of the exemptions in paragraph (a) of this section apply, any reasonably segregable portion of a record shall be provided to the requester after deletion of the portions that are exempt. The amount of information deleted and the exemption under which the deletion is being made shall be indicated on the released portion of the record, unless doing so would harm the interest protected by the exemption under which the deletion is made. If technically feasible, the amount of information deleted and the exemption under which the deletion is being made shall be indicated at the place in the record where the deletion occurs.

* * * * *

6. Paragraph (b) of § 1602.10 is revised to read as follows:

**§ 1602.10 Officials authorized to grant or deny requests for records.**

* * * * *

(b) The General Counsel or designee and the Counsel to the Inspector General or designee are authorized to grant or deny requests under this part. In the absence of a Counsel to the Inspector General, the Inspector General shall name a designee who will be authorized to grant or deny requests under this part and who will perform all other functions of the Counsel to the Inspector General under this part. The General Counsel or designee shall consult with the Office of the Counsel to the Inspector General or designee prior to granting or denying any request for records or portions of records which originated with the Office of Inspector General, or which contain information which originated Office of Inspector General, but which are maintained by other components of the Corporation. The Counsel to the Inspector General or designee shall consult with the Office of the General Counsel prior to granting or denying any request for records or portions of records which originated with any component of the Corporation other than the Office of Inspector General, or which contain information which originated with a component of the Corporation other than the Office of Inspector General, but which are maintained by the Office of Inspector General.

7. Section 1602.13 is amended by designating paragraph (b) as (b)(1) and adding a paragraph (b)(2) to read as follows:

**§ 1602.13 Fees.**

* * * * *

(b) * * *

(2) If no unusual circumstances, as set forth in § 1602.8 apply, if LSC has failed to comply with the time limits set forth in that section, otherwise applicable search fees will not be charged to a requester. In the case of a requester who is a representative of the news media, otherwise applicable duplication fees will not be charged.

* * * * *

**Victor M. Fortuno,**

*Vice President & General Counsel.*

[FR Doc. E8–18450 Filed 8–13–08; 8:45 am]

**BILLING CODE 7050–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 10

**[PS Docket No. 07–287; FCC 08–164]**

### Commercial Mobile Alert System

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission

(Commission or FCC) seeks comment on whether it should adopt rules that require non-commercial educational (NCE) and public broadcast television station licensees and permittees to test the equipment that they are required to install pursuant to the rules adopted in the CMAS Second Report and Order (FCC 08–164), which the Commission released along with this Further Notice of Proposed Rulemaking (FNPRM). The Commission also seeks comment on how any such testing rules should be implemented.

**DATES:** Comments are due on or before September 15, 2008, and reply comments are due on or before September 29, 2008.

**ADDRESSES:** The Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. You may submit comments, identified by PS Docket No. 07–287, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov/.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Jeffery Goldthorp, Communications Systems Analysis Division, Public Safety and Homeland Security Bureau, Federal Communications Commission at (202) 418–1096.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's CMAS Further Notice of Proposed Rulemaking in PS Docket No. 07–287, FCC 08–164, adopted and released on July 8, 2008. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., in person at 445 12th Street, SW, Room CY–B402, Washington, DC 20554, via telephone at (202) 488–5300, via facsimile at (202) 488–5563, or via e-mail at *FCC@BCPIWEB.COM.* Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by sending an e-mail to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530, TTY (202) 418–0432. This document is also available on the Commission's Web site at *http://www.fcc.gov.*

*Comment and Reply Comment Filing Instructions.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply to comments on or before the dates indicated on the first page of this document. All filings should refer to PS Docket No. 07–287. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

✖ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.

■ For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

■ *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

■ The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

■ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

■ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

*People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

*Initial Paperwork Reduction Act of 1995 Analysis.* This FNPRM may result in a new or modified information collection requirement. If the Commission adopts any new or revised information collection requirement as a result of this proceeding, the Commission will publish a notice in the **Federal Register** inviting the public to comment on the new or revised information collection requirement, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission will seek specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

Comments and reply comments must include a short and concise summary of the substantive discussion and questions raised in the FNPRM. All interested parties should include the name of the filing party and the date of the filing on each page of their comments and reply comments. The Commission strongly encourages parties to track the organization set forth in this FNPRM in order to facilitate our internal review process. Comments and reply comments must otherwise comply with section 1.48 and all other applicable sections of the Commission's rules.

**Synopsis of the Further Notice of Proposed Rulemaking**

1. In the CMAS Second Report and Order, released concurrently with this Further Notice of Proposed Rulemaking, the Commission took two further steps towards the establishment of a functioning CMAS. First, it adopted rules that require NCE and public broadcast television station licensees and permittees ''to install necessary equipment and technologies on, or as part of, any broadcast television digital signal transmitter to enable the distribution of geographically targeted alerts by commercial mobile service providers that have elected to transmit emergency alerts * * *'' Second, the Commission implemented section 602(f) of the WARN Act which requires the Commission to adopt rules requiring ''technical testing for commercial mobile service providers that elect to transmit emergency alerts and for the devices and equipment used by such providers for transmitting such alerts.'' In this FNPRM, the Commission seeks comment on whether it should adopt rules that require NCE and public broadcast television station licensees and permittees to test the equipment that the Commission has required that they install in the CMAS Second Report and Order.

2. Initially, the Commission seeks comment on its authority to require testing of this equipment by NCE and public broadcast television station licensees and permittees. Does the Commission's authority to require the testing of NCE and public broadcast television station equipment derive directly from section 602(c) and/or 602(f) of the WARN Act? Does it arise from some other legal authority?

3. In its recommendations, the CMSAAC noted that an important part of a successful CMAS will be the ability to effectively test and troubleshoot the various CMAS components and interfaces. In this regard, the CMSAAC recommended that the Alert Gateway support several types of testing, including functional testing for the C interface. Accordingly, as indicated above, the Commission requires Participating CMS providers to test CMAS alert delivery across the ''C'' interface. The rules the Commission adopted in the CMAS Second Report and Order require licensees and permittees of NCE and public broadcast television stations to install necessary equipment and technologies at, or as part of, their digital television transmitters that will provide them with the capability to receive CMAS alerts sent from the Alert Gateway over a secure, alternate interface and to transmit the alerts to the CMS Provider Gateways of participating CMS providers. NCE and public broadcast television station licensees and permittees will, in essence, provide a redundant path by which participating CMS providers will be able to receive geo-targeted alerts. In light of this, should they be required to participate in CMAS testing? If so, how should this be implemented? Should the Commission implement similar requirements as those it has adopted for participating CMS providers in the Second Report and Order? Should a different testing regime be implemented given the unique characteristics of NCE/public broadcast television stations and digital television technology? The Commission seeks comment on all of these issues.

**Initial Regulatory Flexibility Analysis**

4. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this FNPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided in Section IV of the item. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

5. *Need for, and Objectives of, the Proposed Rules.* With the FNPRM, the Federal Communications Commission (Commission) seeks comment whether it should require non-commercial educational (NCE) and public broadcast television station licensees and permittees to test the ''necessary equipment and technologies [that they have installed] on, or as part of, any broadcast television digital signal transmitter to enable the distribution of geographically targeted alerts by commercial mobile service providers that have elected to transmit emergency alerts.'' The Commission seeks comment on this issue in order to satisfy the statutory requirement imposed by the WARN Act that the Commission implement an effective Commercial Mobile Alert System (CMAS).

6. Section 602(c) of the WARN Act requires the Commission to adopt rules under which licensees and permittees of noncommercial educational (NCE) broadcast stations or public broadcast stations install necessary equipment and technologies on, or as part of, any broadcast television digital signal transmitter to enable the distribution of geographically targeted alerts by CMS providers that have elected to participate in the CMAS. Further, section 602(f) of the WARN Act requires the Commission to adopt rules for technical testing requirements for CMS providers that elect to transmit emergency alerts and for the devices and equipment used by such providers for transmitting such alerts. In this FNPRM the Commission seeks comment on questions concerning the testing obligations of NCE and public broadcast television station licensees and permittees that have installed the equipment required by section 602(c) of the WARN Act.

7. *Legal Basis.* Authority for the actions proposed in the FNPRM may be found in sections 1, 4(i) and (o), 201, 303(r), 403, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), 201, 303(r), 403, and 606, as well as sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act.

**Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

8. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

9. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

10. *Small Organizations.* A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 2002, there were approximately 1.6 million small organizations.

11. *Small Governmental Jurisdictions.* The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns,

townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. The Commission estimates that, of this total, 84,377 entities were ''small governmental jurisdictions.'' Thus, the Commission estimates that most governmental jurisdictions are small.

12. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category. Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, the Commission will estimate small business prevalence using the prior categories and associated data. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, using the prior categories and the available data, the Commission estimates that the majority of wireless firms can be considered small.

13. *Cellular Radiotelephone Service*. As noted, the SBA has developed a small business size standard for small businesses in the category ''Wireless Telecommunications Carriers (except satellite).'' Under that SBA category, a business is small if it has 1,500 or fewer employees. Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category. Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, the Commission will estimate small business prevalence using the prior categories and associated data.

14. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, using the prior categories and the available data, the Commission estimates that the majority of wireless firms can be considered small.

15. *Auctions*. In addition, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

16. *Broadband Personal Communications Service*. The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

17. *Narrowband Personal Communications Service*. The Commission held an auction for narrowband Personal Communications Service (PCS) licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

18. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305–2320 MHz and 2345–2360 MHz bands. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

19. *700 MHz Guard Bands Licenses.* In the 700 MHz Guard Bands Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses for each of two spectrum blocks commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of remaining 700 MHz Guard Bands licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses. Subsequently, in the 700 MHz Second Report and Order, the Commission reorganized the licenses pursuant to an agreement among most of the licensees, resulting in a spectral relocation of the first set of paired spectrum block licenses, and an elimination of the second set of paired spectrum block licenses (many of which were already vacant, reclaimed by the Commission from Nextel). A single licensee that did not participate in the agreement was grandfathered in the initial spectral location for its two licenses in the second set of paired spectrum blocks. Accordingly, at this time there are 54 licenses in the 700 MHz Guard Bands.

20. *700 MHz Band Commercial Licenses.* There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698–757, 758–763, 776–787, and 788–793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) ''Small business,'' which is defined as an entity that has attributed average annual gross revenues that do not exceed $15 million during the preceding three years; and (2) ''very small business,'' which is defined as an entity with attributed average annual gross revenues that do not exceed $40 million for the preceding three years. In Block C of the Lower 700 MHz Band (710–716 MHz and 740–746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: An ''entrepreneur,'' which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards.

21. An auction of 740 licenses for Blocks C (710–716 MHz and 740–746 MHz) and D (716–722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: five EAG licenses and 251 CMA licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

22. The remaining 62 megahertz of commercial spectrum is currently scheduled for auction on January 24, 2008. As explained above, bidding credits for all of these licenses will be available to ''small businesses'' and ''very small businesses.''

23. *Advanced Wireless Services.* In the AWS–1 Report and Order, the Commission adopted rules that affect applicants who wish to provide service in the 1710–1755 MHz and 2110–2155 MHz bands. The Commission did not know precisely the type of service that a licensee in these bands might seek to provide. Nonetheless, the Commission anticipated that the services that will be deployed in these bands may have capital requirements comparable to those in the broadband Personal Communications Service (PCS), and that the licensees in these bands will be presented with issues and costs similar to those presented to broadband PCS licensees. Further, at the time the broadband PCS service was established, it was similarly anticipated that it would facilitate the introduction of a new generation of service. Therefore, the AWS–1 Report and Order adopts the same small business size definition that the Commission adopted for the broadband PCS service and that the SBA approved. In particular, the AWS–1 Report and Order defines a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. The AWS–1 Report and Order also provides small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.

24. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service (''BRS''), formerly known as Multipoint Distribution Service (''MDS''), and Educational Broadband Service (''EBS''), formerly known as Instructional Television Fixed Service (''ITFS''), use frequencies at 2150–2162 and 2500–2690 MHz to transmit video programming and provide broadband services to residential subscribers. These services, collectively referred to as ''wireless cable,'' were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. The Commission estimates that the number of wireless cable subscribers is approximately 100,000 as of March 2005. As described below, the SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating $13.5 million or less in annual receipts, appears applicable to MDS and ITFS. Other standards also apply, as described.

25. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are

thus considered small entities. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, the Commission estimates that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

26. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). The Commission estimates that there are currently 2,032 EBS licensees, and all but 100 of the licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 EBS licensees are small entities.

27. *Common Carrier Paging.* As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census category of ''Wireless Telecommunications Carriers (except Satellite).'' Under this category, the SBA deems a business to be small if it has 1,500 or fewer employees. Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category. Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, the Commission will estimate small business prevalence using the prior categories and associated data. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, using the prior categories and the available data, the Commission estimates that the majority of wireless firms can be considered small. Thus, under this category, the majority of firms can be considered small.

28. In the Paging Third Report and Order, the Commission developed a small business size standard for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small business size standards. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 365 carriers reported that they were engaged in the provision of paging and messaging services. Of those, the Commission estimates that 360 are small, under the SBA-approved small business size standard.

29. *Wireless Communications Service.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A ''small business'' is an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as ''very small business'' entities, and one that qualified as a ''small business'' entity.

30. *Wireless Communications Equipment Manufacturers.* While these entities are merely indirectly affected by the Commission's action, the Commission is describing them to achieve a fuller record. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

31. *Software Publishers.* While these entities are merely indirectly affected by the Commission's action, the Commission is describing them to achieve a fuller record. These companies may design, develop or publish software and may provide other support services to software purchasers, such as providing documentation or assisting in installation. The companies may also design software to meet the needs of specific users. The SBA has developed a small business size standard of $23 million or less in average annual receipts for the category of Software Publishers. For Software Publishers, Census Bureau data for 2002 indicate that there were 6,155 firms in the category that operated for the entire year. Of these, 7,633 had annual receipts of under $10 million, and an additional 403 firms had receipts of between $10 million and $24,999,999. For providers of Custom Computer Programming Services, the Census Bureau data indicate that there were 32,269 firms that operated for the entire year. Of these, 31,416 had annual receipts of under $10 million, and an additional 565 firms had receipts of between $10 million and $24,999,999. Consequently, the Commission estimates that the majority of the firms in this category are small entities that may be affected by the Commission's action.

32. *NCE and Public Broadcast Stations.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' The SBA has created a small business size standard for Television Broadcasting entities, which is: such firms having $13 million or less in annual receipts. According to Commission staff review of the BIA

Publications, Inc., Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States had revenues of $12 (twelve) million or less. The Commission notes, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by the Commission's action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

33. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent. There are also 2,117 low power television stations (LPTV). Given the nature of this service, the Commission will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

34. The Commission has, under SBA regulations, estimated the number of licensed NCE television stations to be 380. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by the Commission's action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

**Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

35. There are potential reporting or recordkeeping requirements proposed in this FNPRM. For example, any testing regime will entail some form of record keeping. The FNPRM also seeks comment on potential testing procedures for the CMAS that could affect CMS providers as well as Wireless Communications Equipment Manufacturers. The proposals set forth in the FNPRM are intended to advance the Commission's public safety mission and establish an effective CMAS in a manner that imposes minimal regulatory burdens on affected entities.

**Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

36. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

37. As noted in paragraph 1 above, this FNPRM seeks comment on the narrow question of whether the Commission should require NCE and public broadcasting television licensees and permittees to test any equipment that they are required to install pursuant to section 602(c) of the WARN Act. In commenting on this question, commenters are invited to propose steps that the Commission may take to minimize any significant economic impact on small entities. When considering proposals made by other parties, commenters are invited to propose significant alternatives that serve the goals of these proposals.

**Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules**

38. None.

**Ex Parte Rules**

39. These matters shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

**Ordering Clauses**

40. *It is ordered*, that pursuant to sections 1, 4(i) and (o), 201, 303(r), 403, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), 201, 303(r), 403, and 606, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act, this Further Notice of Proposed Rulemaking *is* hereby *adopted*.

41. *It is further ordered* that the Commission's Consumer and Government Affairs Bureau, Reference Information Center, *shall send* a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Council for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–18143 Filed 8–13–08; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 22

**[FWS–R9–MB–2008–0057; 91200–1231–9BPP–L3]**

**RIN 1018–AV81**

## Eagle Permits; Take Necessary To Protect Interests in a Particular Locality

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; notice of availability of draft environmental assessment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (we or us), announce the availability of a draft environmental assessment (DEA) evaluating options for managing take of bald eagles and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act). The DEA examines the effects of the action we proposed in a June 5, 2007 proposed rulemaking to establish two new permits under the Eagle Act (72 FR

31141), and two additional alternatives. We are soliciting current data regarding populations of both eagle species for the DEA. We are also seeking input regarding criteria to be used in quantifying take that occurs at important eagle-use areas, such as foraging areas, communal roost sites, or other concentration areas. Further, we are reopening the comment period on the proposed rule, which is the preferred alternative of the DEA. We have made some revisions and additions to the preferred alternative based on public comment received during the comment period on the proposed rule. Revisions of a substantive nature are noted in the Background section of this notice, and discussed more fully in the DEA.

**DATES:** Send your comments on the DEA and/or proposed rule by September 15, 2008.

**ADDRESSES:** We will post the DEA on *http://www.fws.gov/migratorybirds/*, or you may contact the Division of Migratory Birds Management at 4410 North Fairfax Drive, MS 4107, Arlington, VA 22203–1610. You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018–AV81; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Diana Whittington, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, at 703–358–2010.

**SUPPLEMENTARY INFORMATION:**

## Public Comments

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. Please note that we may not consider comments we receive after the date specified in the **DATES** section in our final determination.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that we will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4501 N. Fairfax Drive, 4th Floor, Arlington, VA 22203; telephone (703) 358–2010.

## Background

On June 5, 2007, we published in the **Federal Register** a proposed rule (72 FR 31141) to provide certain authorizations to take bald eagles and golden eagles under the Eagle Act (16 U.S.C. 668–668d). The rule would establish a permit to authorize take that is associated with otherwise-lawful activities but which is not the purpose of the activity. In addition to authorizing the impacts of new activities, we proposed to use the new permit to extend Eagle Act take authorization to take previously exempted from the prohibitions of the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) under ESA section 7. A second type of permit proposed in the rulemaking would authorize intentional take of eagle nests in rare cases where their location poses a risk to the public welfare or to the eagles themselves. Finally, the rule contained a proposed regulatory provision that would provide take authorization under the Eagle Act to ESA section 10 permittees who continue to operate in full compliance with the terms and conditions of their existing permits.

We are finalizing the proposed actions under two separate rulemakings. The authorizations associated with extending Eagle Act authorization to bald eagle take previously authorized under the ESA are categorically excluded from the requirement to prepare an environmental assessment under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347d) under Departmental procedures. In order to have those authorizations available at the earliest practical date, we have bifurcated the proposed rule. We are finalizing the ESA-related provisions ahead of the subject of the DEA we are releasing today, which is the remainder of the proposal.

We have prepared the DEA under NEPA to analyze alternatives associated with the two new permit regulations we proposed in June. In the DEA, we considered three alternatives for managing take under the Eagle Act.

Under Alternative 1, we would finalize regulations to extend Eagle Act authorization to bald eagle take that is authorized under the ESA, but we would not promulgate the additional regulations we proposed to (1) authorize take that is associated with, but not the purpose of, an action, and (2) authorize nest removal to protect safety and public welfare. This is the ''No Action'' alternative because the only action that we would finalize is the one we would address in a separate rulemaking and is not subject to this environmental assessment.

Under Alternative 2, in addition to finalizing the actions described under Alternative 1, we would promulgate regulations for both of the proposed permits, but permits to authorize take that is associated with, but not the purpose of, an action would be limited to disturbance. No other forms of take would be authorized. We could authorize programmatic disturbance and nest take if the permittee implements advanced conservation practices (see discussion below).

Alternative 3 is the proposed action, with modifications, and the preferred alternative. Alternative 3 includes all elements of Alternative 2, with the addition that take that results in mortalities could also be authorized. Based on public comment received on the June 5, 2007, proposed rule, and on new information compiled through the process of drafting the DEA, we have made some modifications to the preferred alternative. In addition to a variety of minor revisions, Alternative 3 contains the following additions and changes to the proposed rule:

- As discussed above, we split the rule into two rules that we will finalize separately from one another. We separated the original proposal to extend (or ''grandfather'') Eagle Act take authorization to take previously authorized under the ESA from the remainder of the provisions in order to finalize the ''grandfathering'' provisions more expeditiously.
- We modified our interpretation (provided in the June 5, 2007, proposed rule) of the statutory mandate that permitted take be ''compatible with the preservation of the bald eagle or the golden eagle.'' In the original proposal, we proposed to use the standard that regional and national eagle populations not decline at a rate greater than 0.54% annually. Our preferred alternative now requires increasing or stable regional populations to meet the ''preservation'' standard.

• The rule would include issuance criteria to ensure that, except for safety emergencies, Native American religious needs are given first priority if requests for permits exceed take thresholds that are compatible with the preservation of the bald eagle or the golden eagle.

• The rule would no longer provide different issuance criteria for lethal versus non-lethal take. Rather, it proposes separate provisions for programmatic take versus individual instances of take. Programmatic take (take that is recurring and not in a specific, identifiable timeframe and/or location) would be authorized only where it is unavoidable despite implementation of comprehensive measures (''advanced conservation practices'') developed in cooperation with the Service to reduce the take below current levels. ''Advanced conservation practices'' refers to scientifically-supportable measures representing the best available techniques designed to reduce disturbance and ongoing mortalities to a level where remaining take is unavoidable.

• The rule would amend the existing eagle depredation permit regulations at 50 CFR 22.23 to extend permit tenure beyond 90 days for purposes of hazing eagles. The purpose of these revisions would be to enable issuance of permits that combine programmatic authorizations provided under § 22.23 and the new proposed take regulations (e.g., for airport safety purposes).

• The rule would expand (from the proposed rule) the purposes for which eagle nests may be taken to include where necessary to protect public health and welfare. The proposed rule limited nest removal to emergencies where human or eagle safety was imminently threatened. Nest removal for emergencies would be retained, and would authorize the removal and/or relocation of active and inactive nests where genuine safety concerns necessitate their removal. The broader application would allow us to issue permits to remove only inactive nests in some circumstances where the presence of the nest does not immediately threaten injury or loss of life, but does interfere with maintenance or expansion of infrastructure needed to protect overall public health and welfare. An example of the broader application would be a site in an underserved community where a new hospital is to be built, where the building was designed to avoid three eagle nests in a territory, but as construction is set to begin, eagles build a new nest in the only remaining available building site. In this situation (depending on consideration of any other relevant factors), take of the nest may be considered necessary to protect public health and welfare, even though take is not necessary to alleviate an immediate safety threat.

In such situations, where the take of an inactive nest is necessary to protect public health and welfare, but not to alleviate an immediate threat to safety, two additional criteria must be met before we may issue a nest take permit under this section. First, we may not issue the permit unless alternative suitable nesting and foraging habitat is available. Second, the permittee will be required to mitigate for the detrimental impacts to eagles to the fullest extent practicable.

• We propose to redefine some terms and introduce new definitions for a number of additional terms used in the regulations, as follows:

We would define ''eagle nest'' as a ''readily identifiable structure built, maintained, or used by bald eagles or golden eagles for breeding purposes.'' This definition is based on, and replaces, the existing golden eagle nest definition, in order to apply to both species. We would remove the existing definition of ''golden eagle nest'' from the list of definitions. Similarly, we would replace the old definition of ''inactive nest'' with a new definition that also includes bald eagles as well as golden eagles. The new definition would read: ''a bald eagle or golden eagle nest that is not currently being used by eagles as determined by the absence of any adult, egg, or dependent young at the nest for 10 consecutive days. An inactive nest may become active again and remains protected under the Eagle Act.''

The proposed permit regulations under § 22.26 introduced the term ''important eagle-use area'' to refer to nests, biologically important foraging areas, and communal roosts, where eagles are potentially likely to be taken as the result of interference with breeding, feeding, or sheltering behaviors. We now propose to define ''important eagle-use area'' as ''an eagle nest, foraging area, or communal roost site that eagles rely on for breeding, sheltering, or feeding, and the landscape features surrounding such nest, foraging area, or roost site that are essential for the continued viability of the site for breeding, feeding, or sheltering eagles.'' This term refers to the particular areas, within a broader area where human activity occurs, where eagles are more likely to be taken (e.g., disturbed) by the activity because of the higher probability of interference with breeding, feeding, or sheltering behaviors at those areas.

We are also proposing to define terms used within the definition of ''important eagle-use area.'' We would define ''foraging area'' to mean ''an area where eagles regularly feed during one or more seasons.'' We would define ''communal roost site'' as ''an area where eagles gather repeatedly in the course of a season and shelter overnight and sometimes during the day in the event of inclement weather.'' Not all foraging areas and communal roost sites are important enough that interfering with eagles at the site will cause disturbance (resulting in injury or nest abandonment.) Whether eagles rely on a particular foraging area or communal roost site to that degree will depend on a variety of circumstances, most obviously, the availability of alternate sites for feeding or sheltering.

''Territory'' would be defined as ''a defended area that contains, or historically contained, one or more nests within the home range of a mated pair of eagles, and where no more than one pair breeds at a time.''

''Cumulative effects'' would mean ''the incremental environmental impact or effect of the proposed action, together with impacts of past, present, and reasonably foreseeable future actions.''

We would define ''indirect effects'' as ''effects that are caused by an action and which may occur later in time or be located beyond the initial impacts of the action, but are still reasonably foreseeable.''

The preferred alternative continues to include the requirement that an applicant avoid and minimize impacts to eagles to the maximum extent practicable, and document the existing measures in their application for a permit. ''Practicable'' would be defined as ''capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles, (1) the cost of remedy comparative with proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes.''

An additional provision that would be included in the final rule to implement our preferred alternative pertains to the authorizations granted through the other final rulemaking (to extend Eagle Act authorization to take authorized under the ESA) that we separated from the action for which this environmental assessment is being carried out. Under the preferred alternative, the final regulations to establish a new permit for take of eagles where the take is associated with, but not the purpose of, the activity would include a provision that applies to anyone granted take

exemptions under section 7 of the ESA. This would apply in areas where the bald eagle remains listed or is re-listed under the ESA or if the golden eagle becomes listed. Of those persons, those who are issued their section 7 exemptions whose activities will also take eagles under the Eagle Act, and who wish to obtain Eagle Act authorization for that take, would be required to use the new permit regulations at 50 CFR 22.26 that are the subject of this DEA, once those regulations are available, rather than the expedited permit being established under separate regulations.

**Authority:** The authority for this action is the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d).

Dated: July 28, 2008.

**Lyle Laverty,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–18779 Filed 8–13–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 665

**RIN 0648–AV29**

### Fisheries in the Western Pacific; Crustacean Fisheries; Deepwater Shrimp

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of availability of fishery management plan amendment; request for comments.

**SUMMARY:** NMFS announces that the Western Pacific Fishery Management Council proposes to amend the Fishery Management Plan for Crustacean Fisheries of the Western Pacific Region (Crustaceans FMP). If approved by the Secretary of Commerce, Amendment 13 to the Crustaceans FMP would designate deepwater shrimp of the genus *Heterocarpus* as management unit species, and require Federal permits and data reporting for deepwater shrimp fishing in Federal waters of the western Pacific. Amendment 13 is intended to improve information on deepwater shrimp fisheries and their ecosystem impacts, and to provide a basis for future management of the fisheries, if needed.

**DATES:** Comments on Amendment 13, which includes an environmental assessment, must be received by October 14, 2008.

**ADDRESSES:** Comments on the amendment, identified by 0648–AV29, may be sent to either of the following addresses:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov*; or
- Mail: Mail written comments to William L. Robinson, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd, Suite 1110, Honolulu, HI 96814–4700.

Instructions: All comments received are a part of the public record and will generally be posted to www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the commenter may be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Copies of Amendment 13, including an environmental assessment, are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, *www.wpcouncil.org*.

**FOR FURTHER INFORMATION CONTACT:** Brett Wiedoff, NMFS PIR, 808–944–2272.

**SUPPLEMENTARY INFORMATION:** This **Federal Register** document is accessible at the Office of the Federal Register website: *www.gpoaccess.gov/fr*.

Crustacean fisheries in the western Pacific are federally-managed within the waters of the U.S. Exclusive Economic Zone (EEZ) around American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, Hawaii, and the Pacific Remote Island Areas (PRIA, including Palmyra Atoll, Kingman Reef, Jarvis Island, Baker Island, Howland Island, Johnston Atoll, Wake Island, and Midway Atoll). The EEZ around the CNMI and PRIA extends from the shoreline seaward to 200 nautical miles (nm), and the EEZ around the other islands extends from three to 200 nm offshore. Crustaceans FMP management unit species now include spiny lobsters, *Panulirus marginatus* and *P. penicillatus*, slipper lobsters of the family Scyllaridae, and Kona (spanner) crab, *Ranina ranina*.

Eight species of *Heterocarpus* have been reported throughout the tropical Pacific. These shrimp are generally found at depths of 200 to 1,200 meters on the outer reef slopes that surround islands and deepwater banks. Species distribution tends to be stratified by depth with some overlap. The deepwater trap fisheries have primarily targeted *Heterocarpus ensifer* and *H. laevigatus*.

Western Pacific commercial trap fisheries for deepwater shrimp are intermittent. There have been sporadic operations in Hawaii since the 1960s, small-scale fisheries in Guam during the 1970s, and some activity in the CNMI during the mid–1990s. The fisheries have been unregulated, and there has been no comprehensive collection of information about the fisheries. Most of these fishing ventures have been short-lived, probably as a result of sometimes-frequent loss of traps, a shrimp product with a short shelf life and history of inconsistent quality, and the rapid localized depletion of deepwater shrimp stocks leading to low catch rates. Despite these hurdles, interest in deepwater shrimp fisheries continues.

Amendment 13 would designate deepwater shrimp of the genus *Heterocarpus* as management unit species under the FMP, and would require Federal permits and reporting for deepwater shrimp fishing in the EEZ. The proposed monitoring program (permits and logbooks) is intended to improve understanding of these fisheries and their impact on marine ecosystems. Although currently there are no resource concerns regarding western Pacific deepwater shrimp, the proposed designation of these shrimp as management unit species would provide a basis for management of the fisheries, if warranted in the future. Amendment 13 designates Essential Fish Habitat (EFH) for the complete assemblage of adult and juvenile *Heterocarpus* spp. as the outer reef slopes between 300 and 700 meters surrounding every island and submerged banks in the western Pacific, and includes all eight species of deepwater shrimp in the region: *Heterocarpus ensifer*, *H. laevigatus*, *H. sibogae*, *H. gibbosus*, *H. Lepidus*, *H. dorsalis*, *H. tricarinatus* and *H. longirostris*, as required under the Magnuson-Stevens Fishery Conservation and Management Act.

Public comments on proposed Amendment 13 must be received by October 14, 2008 to be considered by NMFS in the decision to approve, partially approve, or disapprove the amendment. A proposed rule to implement the amendment has been prepared for Secretarial review and

approval, and NMFS expects to publish and request public comment on the proposed regulation in the near future.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: August 8, 2008.

**Alan D. Risenhoover,**

*Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–18854 Filed 8–13–08; 8:45 am]

**BILLING CODE 3510–22–S**

# Notices

Federal Register
Vol. 73, No. 158
Thursday, August 14, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Cibola National Forest, Mount Taylor Ranger District, NM, Designation of the Proposed Rinconada Communication Site

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Cibola National Forest will prepare an environmental impact statement to assess the designation and development of the proposed Rinconada Communication Site on the Mt. Taylor Ranger District. The Forest Service proposes to designate a three-acre Rinconada Communication Site that would serve present and future high power communication needs, and to permit the development of a facility within the site.

**DATES:** Comments concerning the scope of the analysis must be received by days after the publication of the NOI. The draft environmental impact statement is expected November, 2008 and the final environmental impact statement is expected March, 2009.

**ADDRESSES:** Send written comments to Nancy Rose, Forest Supervisor, Cibola National Forest, 2113 Osuna Road NE., Albuquerque, NM 87113.

**FOR FURTHER INFORMATION CONTACT:** For further information, mail correspondence to Donald L. Hall, Cibola National Forest, 2113 Osuna Road NE., Albuquerque, NM 87113.

**SUPPLEMENTARY INFORMATION:**

#### Purpose and Need for Action

The proposed high power transmission facility cannot be placed on the existing Microwave Ridge Communication Site, located approximately one-half mile to the north, because the existing site is designated as a low power facility. It is not feasible to co-locate low and high power facilities; therefore, the new communication site is being proposed. The Rinconada site would occupy the location for Microwave Ridge No. 2, which was identified in the Cibola National Forest Land and Resource Management Plan.

#### Proposed Action

The Cibola National Forest has accepted an application for development of an FM transmission facility by KDSK Radio, Inc. within the Mt. Taylor Ranger District. The Forest Service proposes to designate a three-acre Rinconada Communication Site which would serve present and future high power communication needs, and to permit the development of the KDSK facility within the site. The site would provide radio broadcasting service to the citizens of Grants, New Mexico and those who live, commute, and work in the surrounding, more rural areas of Cibola and Valencia Counties. KDSK Radio's development would consist of an unlit, 180-foot, self-supporting tower with antennas, and an equipment building measuring 12 feet by 20 feet.

The proposed Rinconada Communication Site is approximately ½ mile south of the existing Microwave Ridge Communication Site, and is served by an existing power line and existing roads. The proposed site is located adjacent to Forest Service Road 400 in T.11N., R.7W., Section 17, NMPM, Cibola County, New Mexico.

#### Responsible Official

Forest Supervisor Nancy Rose, Cibola National Forest, 2113 Osuna Road NE., Albuquerque, NM 87113.

#### Nature of Decision To Be Made

The Forest Supervisor will use the EIS process to develop the necessary information to make an informed decision on whether or not to designate the Rinconada Communication Site and permit the development of the KDSK facility within the site.

#### Scoping Process

Scoping will include NOI to **Federal Register**, listing in the Quarterly Schedule of Proposed Actions, letters to interested and affected individuals, agencies, and organizations, and legal notices. No public meeting is planned.

#### Preliminary Issues

One preliminary issue has been identified. The designation and development of the Rinconada Communication Site may affect the characteristics that make the Mount Taylor Traditional Cultural Property eligible for the National Register of Historic Places.

#### Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact statement.

*Early Notice of Importance of Public Participation in Subsequent Environmental Review:* A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific

as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement.

Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

**Authority:** 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: August 5, 2008.

**Nancy Rose,**

*Forest Supervisor, Cibola National Forest.*

[FR Doc. E8–18833 Filed 8–13–08; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### National Agricultural Statistics Service

### Notice of Intent To Seek Approval To Conduct an Information Collection

**AGENCY:** National Agricultural Statistics Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to seek approval to conduct two new information collections, the 2008 On-Farm Renewable Energy Production Survey and the 2008 Organic Production and Marketing Survey.

**DATES:** Comments on this notice must be received by October 14, 2008 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by docket number 0535–NEW, 2008 On Farm-Renewable Energy Production Survey and the 2008 Organic Production and Marketing Survey, by any of the following methods:

- *E-mail: ombofficer@nass.usda.gov.* Include docket number and title above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: NASS Clearance Officer, U.S. Department of Agriculture, Room 5336A, Mail Stop 2024, South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: NASS Clearance Officer, U.S. Department of Agriculture, Room 5336A, South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.

**FOR FURTHER INFORMATION CONTACT:** Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

**SUPPLEMENTARY INFORMATION:**

*Title:* 2008 On-Farm Renewable Energy Production Survey, and 2008 Organic Production and Marketing Survey.

*OMB Control Number:* 0535—NEW.

*Type of Request:* Intent to Seek Approval to Conduct two Information Collections as mandated by the Food, Conservation, and Energy Act of 2008.

*Abstract:* The National Agricultural Statistics Service (NASS) of the United States Department of Agriculture (USDA) will request approval from the Office of Management and Budget (OMB) for both the On-Farm Renewable Energy Production Survey and the Organic Products Survey to be conducted as follow-on surveys from the 2007 Census of Agriculture.

(1) The 2008 Energy Produced on Farms Survey will use as a sampling universe every respondent on the 2007 Census of Agriculture who reported energy generation on the farm using wind or solar technology, methane digester, etc. This energy survey will provide a comprehensive inventory of farm-generated energy practices with detailed data relating to category or type of energy produced (wind, solar, hydropower, biomass, methane digester, geothermal, etc.), how much energy was generated, if any energy was sold onto a power grid, and the average payment received per kilowatt hour. Data collection will be in the Spring of 2009 with a final report published in the Fall of 2009. Data will be published at both the U.S. and State level where possible.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 20 minutes per response.

*Respondents:* Farmers, ranchers, and farm managers self identified as producers of energy through the 2007 Census of Agriculture.

*Estimated Number of Respondents:* 16,500.

*Estimated Total Annual Burden on Respondents:* 5,500 hours.

(2) The 2008 Organic Production and Marketing Survey will use as a sampling universe every respondent on the 2007 Census of Agriculture who reported organic production for sale in 2007. This survey will provide organic production by commodity, marketing practices (handling, distribution, retail, and consumer purchasing patterns), and prices received by organic producers. Data collection will be in the Spring of 2009 with a final report published in the Spring of 2010. Data will be published at the U.S. and State level where possible.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 60 minutes per response.

*Respondents:* Farmers, ranchers, and farm managers self identified as organic producers through the 2007 Census of Agriculture.

*Estimated Number of Respondents:* 15,500.

*Estimated Total Annual Burden on Respondents:* 15,500 hours.

The primary objectives of the National Agricultural Statistics Service are to prepare and issue State and national estimates of crop production, livestock production, economic statistics, and environmental statistics related to agriculture and to conduct the Census of Agriculture and its follow on surveys. This notice request is in response to a mandate in 7 U.S.C. 5925c, as amended by the Food, Conservation, and Energy Act of 2008, Section 10302, Public Law 110–246.

*Authority:* These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995).

Copies of this information collection and related instructions can be obtained without charge from the NASS OMB Clearance Officer at (202) 720–2248.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the

burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, August 4, 2008.

**Joseph T. Reilly,**

*Associate Administrator.*

[FR Doc. E8–18793 Filed 8–13–08; 8:45 am]

**BILLING CODE 3410–20–P**

## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

### Gulf Crossing Pipeline Company, LLC; Gulf South Pipeline Company LP; Federal Energy Regulatory Commission (FERC), Docket Nos. CP07–398–000, CP07–398–001, CP07–399–000, CP07–400–000, CP07–401–000, CP07–402–000, CP07–403–000, FERC EIS 0218F; March 21, 2008

**AGENCY:** Natural Resources Conservation Service.

**ACTION:** Notice of availability of the record of decision.

**SUMMARY:** Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR part 1500); and the Natural Resources Conservation Service Guidelines (7 CFR part 650); the Natural Resources Conservation Service, U.S. Department of Agriculture, has decided to subordinate its rights, acquired under the Wetland Reserve Program (WRP), to allow the Gulf Crossing Pipeline Company, LLC to cross NRCS held conservations easements associated with the Gulf Crossing Project in Madison Parish, LA and Fannin, Texas.

On June 19, 2007, Gulf Crossing Pipeline Company LLC (Gulf Crossing) and Gulf South Pipeline Company LP (Gulf South) jointly filed an application under section 7C of the Natural Gas Act (NGA) for authorization to construct and operate facilities to be known as the Gulf Crossing Project which constitutes four compressor stations and an interstate natural gas pipeline.

The Federal Energy Regulatory Commission (FERC) has prepared a final environmental impact statement (EIS) to fulfill requirements of the National Environmental Policy Act (NEPA). The purpose of this document was to make public the analysis of the environmental impacts that would likely result from the construction and operation of the proposed project. The NRCS participated as a cooperating agency in the preparation of the EIS.

The project will affect approximately three (3) NRCS held Wetlands Reserve Program (WRP) easements by creating a 50 ft. permanent right of way (within a 100 ft. construction right of way) that extends for approximately 356.3 miles of which 4.6 miles is over lands encumbered under WRP easements located in Madison, Louisiana and Fannin, Texas.

**FOR FURTHER INFORMATION CONTACT:** Kevin D. Norton, State Conservationist, Natural Resources Conservation Service, 3737 Government Street, Alexandria, Louisiana 71302; telephone (318) 473–7751.

A limited number of copies of the Record of Decisions (ROD) are available to fill single copy requests at the above address. Basic data evaluated for the ROD are on file and may be reviewed by contacting Kevin D. Norton.

Dated: August 6, 2008.

**Kevin D. Norton,**

*State Conservationist.*

[FR Doc. E8–18803 Filed 8–13–08; 8:45 am]

**BILLING CODE 3410–16–P**

## DEPARTMENT OF COMMERCE

### Economic Development Administration

**[Docket No.: 0808071081–81082–01]**

### Solicitation of Proposals and Applications for the FY 2008 Supplemental Appropriations Disaster Relief Opportunity Pursuant to Act of June 30, 2008, Public Law 110–252, 122 Stat. 2323 (2008)

**AGENCY:** Economic Development Administration (EDA), Department of Commerce.

**ACTION:** Notice and request for applications.

**SUMMARY:** Pursuant to section 703 of the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3233), EDA announces general policies and application procedures for the FY 2008 Supplemental Appropriations Disaster Relief Opportunity. This investment assistance will help devise long-term economic redevelopment strategies and carry out implementation activities and public works projects to address economic development challenges in regions impacted by the Midwest storms and floods or other recent natural disasters.

**DATES:** Proposals (also known as pre-applications) are accepted on a continuing basis and applications are invited and processed as received. Generally, up to two months are required for EDA to reach a final decision after receipt of a complete application that meets all requirements. Proposals or applications (as appropriate) received after the date of publication of this notice will be processed in accordance with the requirements set forth herein until superseded by the terms of a federal funding opportunity (FFO) announcement posted on *http://www.grants.gov* and publication of the related notice in the **Federal Register**.

*Pre-Application and Application Submission Requirements:* Proponents are advised to read carefully the instructions contained in the complete FFO announcement for this request for proposals and applications, and in the *Pre-Application for Investment Assistance* (Form ED–900P) and *Application for Investment Assistance* (Form ED–900A). Please note that the requirements for the pre-application are different from the requirements for the application. It is the sole responsibility of the proponent to ensure that the pre-application or application (as appropriate) is complete and received by EDA. The content of the pre-application or the application (as appropriate) is the same for paper submissions as it is for electronic submissions. EDA will not accept facsimile transmissions of pre-applications or applications.

For projects under this notice and request for proposals and applications, a pre-application normally is required. However, given the exigent circumstances that exist as a result of the Midwest storms and floods and other recent natural disasters, the EDA regional office may in some circumstances waive the pre-application requirement for applicants in those affected regions and allow those applicants to submit an application only (no pre-application). Therefore, please contact the appropriate EDA regional office listed below for instructions as to whether you need to complete a pre-application or an application. The regional office staff will provide application instructions.

All relevant forms may be accessed and downloaded at the following Web sites: (i) Forms ED–900P and ED–900A at *http://www.eda.gov/InvestmentsGrants/Application.xml;* (ii) Standard Forms (SF) at either

*www.grants.gov* or at *http://www.eda.gov/InvestmentsGrants/Application.xml;* and (iii) Department of Commerce (CD) forms at *http://ocio.os.doc.gov/ITPolicyandPrograms/Electronic_Forms/index.htm*.

Proponents are advised that in October 2008, EDA anticipates introducing a single-step application process that will obviate use of the current Forms ED–900P and ED–900A. At that time, EDA will publish new application procedures in line with the new single-step application in the **Federal Register** and will post information about those procedures at *http://www.eda.gov*.

*Addresses and Telephone Numbers for EDA's Regional Offices:* If you have a project that will be located in one of the disaster-impacted regions declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) (Stafford Act), please contact the appropriate regional office listed below.

Economic Development Administration, Atlanta Regional Office, 401 West Peachtree Street, NW., Suite 1820, Atlanta, Georgia 30308, Telephone: (404) 730–3002, Fax: (404) 730–3025, Serves: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.

Economic Development Administration, Austin Regional Office, 504 Lavaca Street, Suite 1100, Austin, Texas 78701, Telephone: (512) 381–8144, Fax: (512) 381–8177, Serves: Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

Economic Development Administration, Chicago Regional Office, 111 North Canal Street, Suite 855, Chicago, Illinois 60606, Telephone: (312) 353–7706, Fax: (312) 353–8575, Serves: Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin and Muscatine and Scott counties, Iowa.

Economic Development Administration, Denver Regional Office, 410 17th Street, Suite 250, Denver, Colorado 80202, Telephone: (303) 844–4714, Fax: (303) 844–3968, Serves: Colorado, Iowa (excluding Muscatine and Scott counties), Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming.

Economic Development Administration, Philadelphia Regional Office, Curtis Center, 601 Walnut Street, Suite 140 South, Philadelphia, Pennsylvania 19106, Telephone: (215) 597–4603, Fax: (215) 597–1063, Serves: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, U.S. Virgin Islands, Virginia and West Virginia.

Economic Development Administration, Seattle Regional Office, Jackson Federal Building, Room 1890, 915 Second Avenue, Seattle, Washington 98174, Telephone: (206) 220–7660, Fax: (206) 220–7669, Serves: Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Marshall Islands, Micronesia, Nevada, Northern Mariana Islands, Oregon, Republic of Palau and Washington.

*Application Submission Formats:* Pre-applications or applications may be submitted either (i) in paper (hardcopy) format at the applicable regional office address provided below; or (ii) electronically in accordance with the procedures provided on *www.grants.gov*.

*Paper Submissions:* Under this competitive solicitation, a proponent may submit a completed pre-application or application (as appropriate) to the applicable regional office listed above under ''Addresses and Telephone Numbers for EDA's Regional Offices.'' A proponent advised by the regional office to complete a pre-application should download and print copies of the Form ED–900P and the Form SF–424 (*Application for Federal Assistance*) at *http://www.eda.gov/InvestmentsGrants/Application.xml,* complete Parts I, II and III of Form ED–900P and Form SF–424, and attach the project narrative statement requested in section IV.B.1. of the FFO announcement. The narrative statement should be clearly labeled to identify each addressed topic listed in section IV.B.1. of the FFO announcement. A proponent advised to complete an application should follow the instructions provided by the regional office at the time it is so advised.

Proponents choosing this option must submit one (1) original and two (2) copies of the completed pre-application or application (as appropriate) via postal mail, shipped overnight or hand-delivered to the applicable regional office, unless otherwise directed by EDA staff. Department of Commerce mail security measures may delay receipt of United States Postal Service mail for up to two weeks. Therefore, proponents who wish to submit paper applications are advised to use guaranteed overnight delivery services.

*Electronic Submissions:* Proponents may submit pre-applications or applications (as appropriate) electronically in accordance with the instructions provided by the EDA regional office and the instructions provided at *http://www.grants.gov/applicants/apply_for_grants.jsp*. The preferred file format for electronic attachments (*e.g.*, the project narrative statement and exhibits to Form ED–900P) is portable document format (PDF); however, EDA will accept electronic files in Microsoft Word, WordPerfect, Lotus or Excel formats.

Applicants should access the following link for assistance in navigating *www.grants.gov* and for a list of useful resources: *http://www.grants.gov/applicants/applicant_help.jsp*. If you do not find an answer to your question under ''Applicant FAQS'' at *http://www.grants.gov/applicants/applicant_faqs.jsp*, try consulting the Applicant User Guide. If you still cannot find an answer to your question, contact *www.grants.gov* via e-mail at *support@grants.gov* or telephone at 1–800–518–4726. The hours of operation for *www.grants.gov* are Monday–Friday, 7 a.m. to 9 p.m. (ET) (except for Federal holidays).

**FOR FURTHER INFORMATION CONTACT:** For additional information or for a paper copy of the complete FFO announcement, contact the appropriate EDA regional office listed above. EDA's Internet Web site at *www.eda.gov* also contains additional information on EDA and its programs.

**SUPPLEMENTARY INFORMATION:**

*Background Information:* With funding made available through the Supplemental Appropriations Disaster Relief Opportunity, EDA intends to award investments in regions experiencing severe economic distress as a result of flooding, storms or tornadoes such as those experienced in the Midwest, or other recent natural disasters. Pursuant to this notice, EDA solicits proposals and applications for Economic Adjustment Assistance investments under the Public Works and Economic Development Act of 1965, as amended (PWEDA) (42 U.S.C. 3121 *et seq.*). Through the Economic Adjustment Assistance program (CFDA No. 11.307), selected applicants will utilize EDA's flexible set of program tools to develop and implement on a regional basis long-term economic redevelopment strategies for the recently disaster-impacted regions in the United States.

The Economic Adjustment Assistance program can provide a wide range of technical, planning and infrastructure assistance in regions experiencing adverse economic changes that may occur suddenly or over time. This program is designed to respond

adaptively to pressing economic recovery issues, and is well suited to help address challenges such as those faced by the regions affected by the Midwest storms and floods and other recent natural disasters. Assistance can support development of a strategy (through a ''strategy grant'') to alleviate economic dislocation caused by the disaster or support project implementation (through an ''implementation grant''), such as funding improvements for infrastructure.

EDA recognizes that urgent infrastructure rebuilding needs exist throughout the regions affected by recent natural disasters. In addition, tensions often arise in the wake of a disaster between advocates of immediate infrastructure rebuilding and advocates of rebuilding infrastructure pursuant to a long-term redevelopment strategy. In EDA's experience with post-disaster recovery, the most effective long-term infrastructure rebuilding efforts are based on a long-term development or redevelopment strategy, established either before or after the disaster. For this reason, EDA encourages the submission of applications geared to the development and implementation of long-term, regionally-based, collaborative economic redevelopment strategies. In addition, EDA will regard applications for infrastructure that are substantively supported by such a strategy as more competitive and worthy of funding than applications for infrastructure that are not so supported. Applications for rebuilding damaged infrastructure that are not demonstrably supported by a long-term plan will not be viewed as competitive. EDA will evaluate and select applications according to the information set out below under ''Evaluation Criteria.''

This notice and request for proposals and applications is pursuant to Act of June 30, 2008, Public Law 110–252, 122 Stat. 2323 (2008). Please access the separate FFO announcement posted at *www.grants.gov* on February 21, 2008 for information regarding funding priorities, application and selection processes, time frames and evaluation criteria for EDA's regular Economic Adjustment Assistance and Public Works investments, which are funded under the FY 2008 Consolidated Appropriations Act (Pub. L. 110–161, 121 Stat. 1844 (2007)). Additional information may be found on EDA's Internet Web site at *http://www.eda.gov.* EDA will evaluate and select applications according to the information set forth below under ''Evaluation Criteria'' and ''Funding Priorities'' and in section V. of the FFO announcement.

*Electronic Access:* The complete FFO announcement for the FY 2008 Supplemental Appropriations Disaster Relief Opportunity is available at *www.grants.gov* and at *http://www.eda.gov.*

*Funding Availability:* Under the Act of June 30, 2008, Public Law 110–252, 122 Stat. 2323 (2008), EDA received $100,000,000 as a supplemental appropriation for disaster assistance (Disaster Appropriation). Although the impetus for this appropriation was the storms and flooding experienced this year in the Midwest region of the United States, the law establishes that the funds must be used in regions covered by a major disaster declaration under the Stafford Act, ''as a result of recent natural disasters.'' For purposes of this competitive solicitation, EDA interprets ''recent'' to mean disaster declarations starting January 1, 2008 for incident periods occurring through June 30, 2008, the date of enactment of the Disaster Appropriation.

As set out below, EDA will allocate funds for the Supplemental Appropriations Disaster Relief Opportunity from the Disaster Appropriation among its six regional offices, located in Atlanta, Austin, Chicago, Denver, Philadelphia and Seattle. *See also* section II.B. of the FFO announcement. The funds are provided for the necessary expenses related to the following three activities: (i) Disaster relief; (ii) long-term recovery; and (iii) restoration of infrastructure.

Approximate Allocation per Regional Office:

Atlanta Regional Office—$8.8
Austin Regional Office—$13.8
Chicago Regional Office—$21.4
Denver Regional Office—$52.6
Philadelphia Regional Office—$2.3
Seattle Regional Office—$1.0

At a later date, EDA may adjust the allocation to the regional offices, based on its experience in administering the supplemental appropriation to ensure funds are used to maximum effect, or to adjust to unforeseen changes in recovery efforts.

*Statutory Authority:* The statutory authority for the Economic Adjustment Assistance program is section 209 of PWEDA (42 U.S.C. 3149). Unless otherwise provided in this notice or in the FFO announcement, applicant eligibility, program objectives and priorities, application procedures, evaluation criteria, selection procedures, and other requirements for all programs are set forth in EDA's regulations (codified at 13 CFR chapter III). EDA's regulations and PWEDA are available at *http://www.eda.gov/InvestmentsGrants/Lawsreg.xml.*

*Catalog of Federal Domestic Assistance (CFDA) Number:* 11.307, Economic Adjustment Assistance.

*Applicant Eligibility:* Pursuant to PWEDA, eligible applicants for and eligible recipients of EDA investment assistance under this announcement include a(n): (i) District Organization; (ii) Indian Tribe or a consortium of Indian Tribes; (iii) State, city or other political subdivision of a State, including a special purpose unit of a State or local government engaged in economic or infrastructure development activities, or a consortium of political subdivisions; (iv) institution of higher education or a consortium of institutions of higher education; or (v) public or private non-profit organization or association acting in cooperation with officials of a political subdivision of a State. *See* section 3 of PWEDA (42 U.S.C. 3122) and 13 CFR 300.3.

EDA is not authorized to provide grants directly to individuals or to for-profit entities seeking to start or expand a private business. Such requests may be referred to State or local agencies, or to non-profit economic development organizations.

For the Supplemental Appropriations Disaster Relief Opportunity, EDA will consider proposals or applications (as appropriate) submitted by eligible applicants located in or acting on behalf of the disaster-affected regions, including one or more institutions of higher education; one or more of the States, cities or other units of local government; and economic development organizations, including but not limited to regional multi-jurisdictional District Organizations and public or private non-profit organizations working in cooperation with private for-profit organizations, local businesses and industry leaders.

*Economic Distress Criteria:* Pursuant to the Disaster Appropriation, regional eligibility is predicated upon the Presidential declarations of disaster areas and/or disaster declarations issued by the Federal Emergency Management Agency (FEMA), as listed in section III.B. of the FFO announcement.

*Cost Sharing Requirement:* As stated above, the disaster declarations issued by FEMA provide EDA with the requisite determination of eligibility under section 703 of PWEDA (42 U.S.C. 3233). Similar to the cost-sharing required under that Act, EDA expects to fund seventy-five (75) percent of the eligible cost of such assistance. The remaining twenty-five (25) percent must be borne by the recipient or provided to

the recipient by a third-party as a contribution for the purposes of and subject to the terms of the award. In accordance with statutory authority under section 703 of PWEDA (42 U.S.C. 3233), EDA may, in certain instances, increase the investment rate up to a maximum of one hundred (100) percent. EDA will be particularly inclined to fund the regional strategy grants (as mentioned under ''Background Information'' above) at an investment rate of one hundred (100) percent. In determining whether to increase the federal share above seventy-five (75) percent, EDA will consider whether the applicant has exhausted its effective taxing or borrowing capacity, or other indicia of dire need. Therefore, the applicant must include a narrative that fully describes and defines the ''region'' in which the proposed project will be located and is responsible for demonstrating to EDA, by providing statistics and other appropriate information, the nature and level of economic distress in the region. *See* section IV.B.1. of the FFO announcement for information regarding the project narrative.

While cash contributions are preferred, in-kind contributions, consisting of contributions of space, equipment, or services, or forgiveness or assumptions of debt, may provide the required non-federal share of the total project cost. *See* section 204(b) of PWEDA (42 U.S.C. 3144). EDA will fairly evaluate all in-kind contributions, which must be eligible project costs and meet applicable federal cost principles and uniform administrative requirements. Funds from other federal financial assistance awards are considered matching share funds only if authorized by statute, which may be determined by EDA's reasonable interpretation of the statute. *See* 13 CFR 300.3. The applicant must show that the matching share is committed to the project for the project period, will be available as needed and is not conditioned or encumbered in any way that precludes its use consistent with the requirements of EDA investment assistance. *See* 13 CFR 301.5.

*Intergovernmental Review:* Proposals or applications for assistance under EDA's programs are subject to the State review requirements imposed by Executive Order 12372, ''*Intergovernmental Review of Federal Programs.*''

*Evaluation and Selection Procedures:* EDA's six regional offices conduct all pre-application and application review for EDA's Economic Adjustment Assistance investments. Each pre-application or application (as appropriate) is circulated by a project officer within the applicable EDA regional office for review and comments. When the necessary input and information are obtained, the pre-application or application (as appropriate) is considered by the regional office's investment review committee (IRC), which is comprised of regional office staff. The IRC discusses the pre-application or application (as appropriate) and evaluates it (i) using the general evaluation criteria set forth in 13 CFR 301.8; and (ii) to determine if it meets the program-specific award and application requirements provided in 13 CFR 307.2 and 307.4 for Economic Adjustment Assistance. The general evaluation criteria also are provided below under ''Evaluation Criteria.''

In the case of a pre-application, after completing its evaluation, the IRC recommends to the Selecting Official, who is the Regional Director, whether an application should be invited, documenting its recommendation in meeting minutes or in the investment summary or the project proposal summary and evaluation form. The Selecting Official will consider the evaluations provided by the IRC and the degree to which one or more of the funding priorities provided below are included, in making the decision as to which proponents should be invited to submit formal applications for investment assistance.

If a proponent is selected to submit a full application, the appropriate regional office will provide application materials and guidance in completing them. The proponent generally will have thirty (30) days to submit the completed application materials to the regional office. EDA staff will work with the proponent to resolve application deficiencies. EDA will notify the applicant if EDA accepts a completed application, and it is forwarded for final review and processing in accordance with EDA and Department of Commerce procedures.

Unsuccessful proponents will be notified by postal mail that their proposals were not recommended for funding. Unsuccessful proposals will be retained in the EDA regional office in accordance with EDA's record retention schedule.

*Evaluation Criteria:* EDA will select investment proposals or applications (as appropriate) competitively based on the investment policy guidelines and funding priority considerations listed below. EDA will evaluate the extent to which a project embodies the maximum number of investment policy guidelines and funding priorities possible and strongly exemplifies at least one of each. All investment proposals or applications (as appropriate) will be competitively evaluated primarily on their ability to satisfy one (1) or more of the following investment policy guidelines, each of which are of equivalent weight and also are set forth in 13 CFR 301.8.

1. *Be market-based and results driven.* An EDA investment will capitalize on a region's competitive strengths and will positively move a regional economic indicator measured on EDA's Balanced Scorecard, such as: An increased number of higher-skill, higher-wage jobs; increased tax revenue; or increased private sector investment.

2. *Have strong organizational leadership.* An EDA investment will have strong leadership, relevant project management experience, and a significant commitment of human resources talent to ensure a project's successful execution.

3. *Advance productivity, innovation and entrepreneurship.* An EDA investment will embrace the principles of entrepreneurship, enhance regional industry clusters, and leverage and link technology innovators and local universities to the private sector to create the conditions for greater productivity, innovation, and job creation.

4. *Look beyond the immediate economic horizon, anticipate economic changes, and diversify the local and regional economy.* An EDA investment will be part of an overarching, long-term comprehensive economic development strategy that enhances a region's success in achieving a rising standard of living by supporting existing industry clusters, developing emerging new clusters, or attracting new regional economic drivers.

5. *Demonstrate a high degree of local commitment by exhibiting:*

- High levels of local government or non-profit matching funds and private sector leverage;
- Clear and unified leadership and support by local elected officials; and
- Strong cooperation between the business sector, relevant regional partners and local, State and Federal governments.

*Funding Priorities:* Although the Stafford Act declarations serve as a finding of regional economic distress for purposes of eligibility under this competitive solicitation, EDA will give priority to projects that will render the maximum amount of economic revitalization based on satisfaction of one or more of the following core criteria (investment proposals or applications that meet more than one

core criterion will be given more favorable consideration):

1. *Investments in support of long-term, coordinated and collaborative regional economic development approaches:*

• Establish comprehensive regional economic development strategies that identify promising opportunities for long-term economic growth.

• Exhibit demonstrable, committed multi-jurisdictional support from leaders across all sectors:

i. Public (*e.g.*, mayors, city councils, county executives, senior state leadership);

ii. Institutional (*e.g.*, institutions of higher learning);

iii. Non-profit (*e.g.*, chambers of commerce, development organizations); and

iv. Private (*e.g.*, leading regional businesses, significant regional industry associations).

• Generate quantifiable positive economic outcomes.

2. *Investments that support innovation and competitiveness:*

• Develop and enhance the functioning and competitiveness of leading and emerging industry clusters in an economic region.

• Advance technology transfer from research institutions to the commercial marketplace.

• Bolster critical infrastructure (*e.g.*, transportation, communications, specialized training) to prepare economic regions to compete in the world-wide marketplace.

3. *Investments that encourage entrepreneurship:*

• Cultivate a favorable entrepreneurial environment consistent with regional strategies.

• Enable economic regions to identify innovative opportunities among growth-oriented small- and medium-size enterprises.

• Promote community and faith-based entrepreneurship programs aimed at improving economic performance in an economic region.

4. *Support strategies that link regional economies with the global marketplace:*

• Enable businesses and local governments to understand that ninety-five (95) percent of our potential customers do not live in the United States.

• Enable businesses, local governments and key institutions (*e.g.*, institutions of higher education) to understand and take advantage of the numerous free trade agreements.

• Enable economic development professionals to develop and implement strategies that reflect the competitive environment of the 21st Century global marketplace.

*The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements:* The administrative and national policy requirements for all Department of Commerce awards, contained in the *Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements,* published in the **Federal Register** on February 11, 2008 (73 FR 7696), are applicable to this competitive solicitation.

*Paperwork Reduction Act:* This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Forms ED–900P (*Pre-Application for Investment Assistance*) and ED–900A (*Application for Investment Assistance*) has been approved by the Office of Management and Budget (OMB) under the control number 0610–0094. The use of Form SF–424 (*Application for Financial Assistance*) has been approved under OMB control number 4040–0004. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

*Executive Order 12866 (Regulatory Planning and Review):* This notice has been determined to be not significant for purposes of Executive Order 12866.

*Executive Order 13132 (Federalism):* It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

*Administrative Procedure Act/ Regulatory Flexibility Act:* Prior notice and an opportunity for public comments are not required by the Administrative Procedure Act or any other law for rules concerning grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: August 8, 2008.

**Otto Barry Bird,**

*Chief Counsel, Economic Development Administration.*

[FR Doc. E8–18794 Filed 8–13–08; 8:45 am]

**BILLING CODE 3510–24–P**

## DEPARTMENT OF COMMERCE

### Foreign–Trade Zones Board

**[Docket 44–2008]**

### Foreign–Trade Zone 77 Memphis, Tennessee, Application for Subzone, Black & Decker Corporation(Power Tools, Lawn and Garden Tools, and Home Products Distribution), Jackson, Tennessee

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the City of Memphis, grantee of FTZ 77, requesting special–purpose subzone status for the tools and home products warehousing/distribution facilities of Black & Decker Corporation, in Jackson, Tennessee. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on August 5, 2008.

The Black & Decker site, consisting of a manufacturing plant (2 bldgs., 482,000 sq. ft.) and a distribution center (1 building, 675,000 sq. ft.) on 177 acres, is located at the intersection of Highway 45 North and Passmore Lane in Jackson, Tennessee. The facilities (700 employees) are used for the quality inspection, kitting, repackaging, order fulfillment, warehousing and distribution of power tools, lawn and garden tools, home products and related products and accessories; activities which Black & Decker is proposing to perform under FTZ procedures. Some 75 percent of the components are sourced abroad. About 5 to 10 percent of production is currently exported. None of the activities which Black & Decker is proposing to perform under zone procedures would constitute manufacturing or processing under the FTZ Board's regulations.

Zone procedures would exempt Black & Decker from Customs duty payments on foreign products that are re–exported. On domestic sales, the company would be able to defer payment until merchandise is shipped from the facility. The company may also realize certain logistical benefits related to the use of direct delivery and weekly customs entry procedures. The application indicates that FTZ procedures would be used to support Black & Decker's Tennessee–based distribution activity in competition with facilities abroad.

In accordance with the Board's regulations, Diane Finver of the FTZ staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is October 14, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to October 28, 2008).

A copy of the application will be available for public inspection at each of the following locations: U.S Department of Commerce Export Assistance Center, 22 North Front Street, Suite 200, Memphis, Tennessee 38103; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, D.C. 20230–0002.

For further information, contact Diane Finver at Diane__Finver@ita.doc.gov or (202) 482–1367.

Dated: August 7, 2008.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. E8–18849 Filed 8–13–08; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–602–806]**

### Notice of Final Determination of Sales at Less Than Fair Value and Termination of Critical- Circumstances Investigation: Electrolytic Manganese Dioxide from Australia

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** August 14, 2008.

**SUMMARY:** The Department of Commerce determines that imports of electrolytic manganese dioxide from Australia are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The final weighted–average dumping margins are listed below in the section entitled ''Final Determination of Investigation.''

**FOR FURTHER INFORMATION CONTACT:** Hermes Pinilla or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3477 and (202) 482–1690, respectively.

**SUPPLEMENTARY INFORMATION:**

**Case History**

On March 26, 2008, the Department of Commerce (the Department) published its preliminary determination of sales at less than fair value in the antidumping duty investigation of electrolytic manganese dioxide (EMD) from Australia. See *Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances: Electrolytic Manganese Dioxide from Australia*, 73 FR 15982 (March 26, 2008) (*Preliminary Determination*). On April 18, 2008, we postponed the deadline for the final determination under section 735 (a)(2)(A) of the Act by 60 days to August 8, 2008. See *Postponement of Final Determination of Antidumping Duty Investigation: Electrolytic Manganese Dioxide from Australia*, 73 FR 21108 (April 18, 2008).

We invited parties to comment on the *Preliminary Determination*. We received a case brief from the respondent, Delta EMD Australia Pty. Limited (Delta), on May 19, 2008; the petitioner, Tronox LLC, filed a rebuttal brief on May 27, 2008. At the request of Delta, we held a hearing on June 17, 2008.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this antidumping investigation are addressed in the ''Issues and Decision Memorandum for the Antidumping Duty Investigation of EMD from Australia for the Period of Investigation July 1, 2006, through June 30, 2007'' (Decision Memorandum) from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated August 8, 2008, which is hereby adopted by this notice. This Decision Memorandum is attached to this notice as an appendix and is on file in the Central Records Unit (CRU) in room 1117. In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov/. The paper copy and electronic version of the Decision Memorandum are identical in content.

**Scope of Investigation**

The merchandise covered by this investigation includes all manganese dioxide (MnO2) that has been manufactured in an electrolysis process, whether in powder, chip, or plate form. Excluded from the scope are natural manganese dioxide (NMD) and chemical manganese dioxide (CMD). The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2820.10.00.00. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

**Period of Investigation**

The period of investigation is from July 1, 2006, through June 30, 2007.

**Adverse Facts Available**

For the final determination, we continue to find that, by failing to provide information we requested, Delta did not act to the best of its ability in responding to our requests for information. Thus, the Department continues to find that the use of adverse facts available is warranted for this company under sections 776(a)(2) and (b) of the Act. See *Preliminary Determination*, 73 FR at 15983. As a result of our analysis of comments received, we have changed the adverse facts–available rate for the final determination. Specifically, we have assigned Delta a rate of 83.66 percent based on the rate alleged in the petition, as recalculated in this final determination. See Final Determination Analysis Memorandum (August 8, 2008). Further, pursuant to section 776(c) of the Act and as discussed in the *Preliminary Determination*, we corroborated the key elements of the export–price and normal–value calculation used in the petition to derive an estimated margin from which we have derived the adverse facts–available rate.

**Termination of Critical Circumstances Investigation**

On February 19, 2008, the petitioner in this investigation, Tronox LLC, submitted an allegation of critical circumstances with respect to imports of electrolytic manganese dioxide from Australia. On March 19, 2008, we issued the *Preliminary Determination*, stating that we had reason to believe or suspect critical circumstances exist with respect to imports of EMD from Australia. See *Preliminary Determination*, 73 FR at 15986–88. On July 17, 2008, the petitioner withdrew its critical circumstances allegation and requested that the Department terminate its critical circumstances inquiry. Therefore, we are terminating the critical circumstances investigation and we have not addressed any comments regarding critical circumstances for the final determination. We will instruct U.S. Customs and Border Protection (CBP) to terminate the suspension of liquidation of all imports of subject

merchandise produced and exported by Delta entered, or withdrawn from warehouse, for consumption on or after December 27, 2007, which is 90 days prior to the date of publication of the *Preliminary Determination* (March 26, 2008), and entered before March 26, 2008. CBP shall refund any cash deposits and release any bond or other security previously posted in connection with merchandise produced and exported by Delta, the only known producer and exporter of EMD during this investigation.

**All–Others Rate**

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted–average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all others rate for exporters and producers not individually investigated. This provision contemplates that, if the data do not permit weight–averaging margins other than the zero, de minimis, or total facts available margins, the Department may use any other reasonable method. See also *Statement of Administrative Action* accompanying the Uruguay Round Agreements Act, H. Doc. No. 103–316, at 873 (1994). As discussed above, Delta is the sole respondent in this investigation and has been assigned a margin based on total adverse facts available. Because the petition contained only one estimated dumping margin and because there are no other respondents in this investigation, there are no additional estimated margins available for purposes of establishing an all–others rate. Therefore, with this final determination we are establishing 83.66 percent as the all–others rate.

**Final Determination of Investigation**

We determine that the following weighted–average dumping margins exist for the period July 1, 2006, through June 30, 2007:

| Manufacturer or Exporter | Margin (percent) |
|---|---|
| Delta | 83.66 |
| All Others | 83.66 |

**Continuation of Suspension of Liquidation**

Pursuant to section 735(c)(1)(B) of the Act and 19 CFR 351.211(b)(1), we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from Australia entered, or withdrawn from warehouse, for consumption on or after March 26, 2008, the date of publication of the *Preliminary Determination*. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted–average margin, as indicated in the chart above, as follows: (1) the rate for Delta will be 83.66 percent; (2) if the exporter is not a firm identified in this investigation but the producer is, the rate will be the rate established for the producer of the subject merchandise; (3) the rate for all other producers or exporters will be 83.66 percent. These suspension–of-liquidation instructions will remain in effect until further notice.

**International Trade Commission Notification**

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our final determination. As our final determination is affirmative and in accordance with section 735(b)(2) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

**Notification Regarding APO**

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: August 8, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

**Appendix**

Comment: Profit for Constructed Value

[FR Doc. E8–18848 Filed 8–13–04; 8:45 am]

**Billing Code: 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–918]**

### Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**DATES:** *Effective Date:* August 14, 2008.

**SUMMARY:** On March 25, 2008, the Department of Commerce (''Department'') published its preliminary determination of sales at less than fair value (''LTFV'') in the antidumping investigation of steel wire garment hangers (''hangers'') from the People's Republic of China (''PRC''). On April 14, 2008, the Department published its amended preliminary determination. The period of investigation (''POI'') is January 1, 2007, to June 30, 2007. We invited interested parties to comment on our preliminary determination of sales at LTFV. Based on our analysis of the comments we received, we have made changes to our calculations for the mandatory respondents. The final dumping margins for this investigation are listed in the ''Final Determination Margins'' section below.

**FOR FURTHER INFORMATION CONTACT:** Irene Gorelik or Julia Hancock, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–6905 or (202) 482–1394, respectively.

**Final Determination**

We determine that hangers from the PRC are being, or are likely to be, sold in the United States at LTFV as provided in section 735 of the Tariff Act of 1930, as amended (''the Act''). The estimated margins of sales at LTFV are shown in the ''Final Determination Margins'' section of this notice.

**SUPPLEMENTARY INFORMATION:**

**Case History**

The Department published its preliminary determination of sales at LTFV on March 25, 2008. *See Preliminary Determination of Sales at Less Than Fair Value: Steel Wire Garment Hangers from the People's Republic of China* 73 FR 15726 (March 25, 2008) (''*Preliminary Determination*''). Due to a significant ministerial error, the Department published its amended preliminary determination of sales at LTFV on April 14, 2008. *See Steel Wire Garment Hangers from the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination* 73 FR 20018 (April 14, 2008) (''*Amended Preliminary Determination*''). Additionally, the Department postponed the deadline for the final determination by 60 days to August 7, 2008. *See id.* at 20020–20021. On April 24, 2008, certain separate rate respondents represented by Greenberg Traurig [1] (''Greenberg Respondents'') filed a timely request for a public hearing. Between May 21, 2008, and June 6, 2008, the Department conducted verifications of Shanghai Wells Hanger Co., Ltd. (''Shanghai Wells'') and the Shaoxing Metal Companies.[2] *See* the ''Verification'' section below for additional information.

On June 27, 2008, we invited parties to comment on the Department's proposed change to the scope language within the *Preliminary Determination.* On July 7, 2008, Petitioner [3] and Home Products (Shanghai) Co., Ltd., and Willert Home Products, Inc. (collectively ''Willert'') submitted comments regarding the Department's proposed scope language change. Additionally, Willert included a scope clarification request in its comments dated July 7, 2008, which the Department addresses in the ''Analysis of Comments Received'' and ''Scope Modifications'' sections below.

Upon the July 3, 2008, release of the second of two verification reports,[4] we invited parties to comment on the *Preliminary Determination.* On July 10, 2008, Petitioner, Shanghai Wells, the Shaoxing Metal Companies, and other interested parties filed case briefs. On July 11, 2008, the Department rejected the case brief submitted by the Greenberg Respondents because it contained untimely, new factual information. *See* the Department's letter to all interested parties dated July 11, 2008. On July 11, 2008, the Greenberg Respondents resubmitted their revised case brief, which the Department also rejected because the untimely, new information had not been properly redacted in its entirety. *See* the Department's letter to all interested parties dated July 14, 2008. On July 15, 2008, the Greenberg Respondents resubmitted their case brief with the untimely, new information redacted in its entirety. On July 15, 2008, the Shaoxing Metal Companies, Shanghai Wells, and Petitioner filed rebuttal briefs. On July 17, 2008, the Greenberg Traurig Respondents withdrew their request for a public hearing, leaving no public hearing request on the record.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the ''Investigation of Steel Wire Garment Hangers from the People's Republic of China: Issues and Decision Memorandum,'' dated August 7, 2008 (''Issues and Decision Memorandum''), which is hereby adopted by this notice. A list of the issues which parties raised and to which we respond in the Issues and Decision Memorandum is attached to this notice as an appendix. The Issue and Decision Memorandum is a public document and is on file in the Central Records Unit (''CRU''), Main Commerce Building, Room 1117, and is accessible on the World Wide Web at *http://www.trade.gov/ia.* The paper copy and electronic version of the memorandum are identical in content.

**Changes Since the Preliminary Determination**

Based on our analysis of information on the record of this investigation, and comments received from the interested parties, we have made changes to the margin calculations for the Shaoxing Metal Companies and Shanghai Wells. We have revalued several of the surrogate values used in the *Preliminary Determination.* The values that were modified for this final determination are those for surrogate financial ratios, steel scrap, and the wage rate. For further details see Issues and Decision Memorandum at Comments 3, 6, and 7, and Memorandum to the File from Julia Hancock, through Catherine Bertrand, Program Manager, AD/CVD Operations, Office 9, and James C. Doyle, Director, AD/CVD Operations, Office 9; Steel Wire Garment Hangers from the People's Republic of China: Surrogate Values for the Final Determination, dated August 7, 2008 (''*Final Surrogate Value Memo*'').

In addition, we have made some company-specific changes since the *Preliminary Determination.* Specifically, we have incorporated, where applicable, post-preliminary clarifications based on verification and corrected certain clerical errors for Shanghai Wells. We have also applied partial adverse facts available, where applicable, for various findings from verification of both companies. For further details on these company-specific changes, *see* Issues and Decision Memorandum at Comments 8 and 9.

**Scope Modifications**

Since the publication of the *Preliminary Determination,* the Department became concerned that certain language in the scope might create opportunities for circumvention. Therefore, on June 27, 2008, the Department invited interested parties to comment on a proposed change to the scope language. *See* Letter to All Interested Parties, dated June 27, 2008. As stated above, Willert and Petitioner submitted comments. Specifically, Petitioner stated that it supported the Department's proposed change to the scope of the investigation. Consequently, we are modifying the scope to include language that the

[1] These companies are: United Wire Hanger Corporation, Laidlaw Company, Zhejiang Lucky Cloud Hanger Co., Ltd., Shangyu Baoxiang Metal Product Co., Ltd., Shaoxing Dingli Metal Clotheshorse Co., Shaoxing Meideli Metal Hanger Co., Ltd., Shaoxing Shunji Metal Clotheshorse Co., Ltd., and Shaoxing Zhongbao Metal Manufactured Co. Ltd., Shaoxing Liangbao Metal Manufactured Co. Ltd.

[2] The Shaoxing Metal Companies consist of: Shaoxing Gangyuan Metal Manufactured Co., Ltd. (''Gangyuan''), Shaoxing Andrew Metal Manufactured Co., Ltd. (''Andrew''), Shaoxing Tongzhou Metal Manufactured Co., Ltd. (''Tongzhou''), and Company X. The Department normally does not consider a respondent's supplier's name to be business proprietary information. However, in this instance, counsel for the Shaoxing Metal Companies bracketed this information as business proprietary and the Department did not challenge this treatment. *See* Memorandum to the File from Julia Hancock, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Steel Wire Garment Hangers from the People's Republic of China: Shaoxing Metal Companies, (August 7, 2008) (''Shaoxing Final Analysis Memo'') for more information regarding the identity of this company; Shaoxing Metal Companies' Request for Collapsing, (February 26, 2008) at 15.

[3] The Petitioner is M&B Metal Products Company Inc.

[4] *See* Memorandum to the File through Catherine Bertrand, Program Manager, Office 9, from Irene Gorelik, Senior Case Analyst: Verification of the Sales and Factors Response of Shanghai Wells Hanger Co., Ltd. in the Antidumping Investigation of Steel Wire Garment Hangers from the People's Republic of China (''PRC'') (July 1, 2008) (''*Shanghai Wells Verification Report*''), and Memorandum to the File through Catherine Bertrand, Program Manager, Office 9, from Julia Hancock, Senior Case Analyst: Verification of the Sales and Factors Response of the Shaoxing Metal Companies in the Antidumping Investigation of Steel Wire Garment Hangers from the People's Republic of China (''PRC''), (July 3, 2008) (''*Shaoxing Metal Verification Report*'').

Department proposed in its June 27, 2008, letter.

Willert briefly referenced the Department's proposed change to the scope but focused its comments on a scope clarification request regarding its vinyl-dipped steel wire garment hangers, which we address fully in the Issues and Decision Memorandum at Comment 1. We are denying Willert's scope modification request because both the Department and Petitioner remain concerned about the possibility of circumvention under Willert's proposed exclusion. *See* Issues and Decision Memorandum at Comment 1.

**Scope of Investigation**

The merchandise that is subject to this investigation is steel wire garment hangers, fabricated from carbon steel wire, whether or not galvanized or painted, whether or not coated with latex or epoxy or similar gripping materials, and/or whether or not fashioned with paper covers or capes (with or without printing) and/or nonslip features such as saddles or tubes. These products may also be referred to by a commercial designation, such as shirt, suit, strut, caped, or latex (industrial) hangers. Specifically excluded from the scope of this investigation are wooden, plastic, and other garment hangers that are not made of steel wire. The products subject to this investigation are currently classified under HTSUS subheading 7326.20.0020 and 7323.99.9060.

Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise is dispositive.

**Affiliations**

In the *Preliminary Determination,* the Department determined that, based on the evidence on the record in this investigation and based on the evidence presented in Gangyuan's questionnaire responses, we preliminarily found that Gangyuan is affiliated with Andrew, Tongzhou, and Company X [5] pursuant to sections 771(33)(E), (F), and (G) of the Act, based on ownership and common control. *See Preliminary Determination,* 73 FR at 15729. In addition to being affiliated, we stated that these individual companies have production facilities for similar or identical products that would not require substantial retooling and there is a significant potential for manipulation of production based on the level of common ownership and control, shared management, and an intertwining of business operations. *See* 19 CFR 351.401(f)(1) and (2). Thus, we also found that they should be considered as a single entity known as the Shaoxing Metal Companies for purposes of this investigation. *See* 19 CFR 351.401(f).

No other information has been placed on the record since the *Preliminary Determination* to contradict the above information upon which we based our finding that these companies constitute a single entity. Therefore, for the final determination, we continue to find that the Shaoxing Metal Companies are a single entity pursuant to sections 771(33)(E), (F), and (G) of the Act, based on ownership and common control. We also continue to determine that they should be considered as a single entity for purposes of this investigation. *See* 19 CFR 351.401(f).

**Use of Facts Available**

Section 776(a)(2) of the Act provides that, if an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified; the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party ''promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative form in which such party is able to submit the information,'' the Department may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed ''deficient'' under section 782(d) if: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Furthermore, section 776(b) of the Act states that if the Department ''finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority..., the administering authority..., in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.'' *See also* Statement of Administrative Action (''SAA'') accompanying the Uruguay Round Agreements Act (URAA), H.R. Rep. No. 103–316, Vol. 1 at 870 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199.

**Shanghai Wells**

For the final determination, in accordance with sections 773(c)(3)(B) and 776(a)(1) of the Act, we have determined that the use of neutral facts available (''FA'') is required for Shanghai Wells's consumption of drawing powder used in the production of subject merchandise as a factor of production rather than an overhead expense, as reported by Shanghai Wells. *See Issues and Decision Memorandum* at Comment 2. As neutral FA, we are using the public version of the consumption ratio reported by Shaoxing Gangyuan, one of the companies within the single entity, Shaoxing Metal Companies, the other mandatory respondent in this investigation. *See* Memorandum to the File from Irene Gorelik, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Steel Wire Garment Hangers from the People's Republic of China: Shanghai Wells (August 7, 2008) (''*Shanghai Wells Final Analysis Memo*''), for further details on the treatment of drawing powder. *See also Final Surrogate Value Memo* for the surrogate value used to value drawing powder.

[5] Company X is business proprietary information. *See* Memorandum to the File from Julia Hancock, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Steel Wire Garment Hangers from the People's Republic of China: Shaoxing Metal Companies, (August 7, 2008) (''Shaoxing Final Analysis Memo'') for more information regarding the identity of this company.

Additionally, for the final determination, in accordance with sections 773(c)(3)(B) of the Act, section 776(a)(2)(A), (B) and (D) of the Act, and section 776(b) of the Act, we have determined that the use of adverse facts available (''AFA'') is warranted for Shanghai Wells's unreported consumption of water that is used in its production process. *See Issues and Decision Memorandum* at Comment 9D; *Shanghai Wells Verification Report* at 2, 35. As partial AFA, we are using Gangyuan's public version consumption ratios for water, which is the only available consumption ratio on the record. Additionally, in accordance with sections 773(c)(3)(B) of the Act, section 776(a)(2)(A), (B) and (D) of the Act, and section 776(b) of the Act, we have determined that the use of AFA is warranted for Shanghai Wells's unreported consumption of lubricant lard that is used in the production process. *See id.* To account for Shanghai Wells's lubricant lard, because Gangyuan did not use lubricant lard in the production of subject merchandise and as there is no lubricant lard consumption information on the record, the Department will use Gangyuan's water consumption ratio a second time as a proxy for the lubricant lard. We find this to be appropriate because Shanghai Wells uses two lubricant inputs in the wire rod drawing process, and we are using the only record information on lubricant inputs as the AFA plug for each lubricant input used by Shanghai Wells. Given the limited information on the record, we find this to be a sufficient basis for an adverse inference.

**Shaoxing Metal Companies**

For the final determination, in accordance with section 776(a)(2)(B) of the Act, we have determined that the use of partial neutral FA is required for the Shaoxing Metal Companies' consumption of water. *See Issues and Decision Memorandum* at Comment 8D. As partial FA, we are using certain months of reported data during the POI to calculate an average of the Shaoxing Metal Companies' average actual consumption of water. *See* Memorandum to the File from Julia Hancock, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Steel Wire Garment Hangers from the People's Republic of China: Shaoxing Metal Companies, (August 7, 2008) (''*Shaoxing Final Analysis Memo*'') for further details on the treatment of water.

Additionally, for the final determination, in accordance with sections 776(a)(2)(A), (B) and (D) of the Act, and section 776(b) of the Act, we have determined that the use of AFA is warranted for the Shaoxing Metal Companies' unverified white paper inputs, brown paper inputs, and steel scrap sales. *See Issues and Decision Memorandum* at Comment 8E; the Shaoxing Metal Verification Report, at 33–34, 37, and 46–47. As partial AFA for Gangyuan's and Andrew's white paper, we have assigned Tongzhou's highest verified usage ratio of white paper on the record as the usage ratio for Gangyuan's and Andrew's consumption of white paper. Additionally, as partial AFA for the Gangyuan's, Andrew's, and Tongzhou's brown paper, we have assigned the highest usage ratio of brown paper of the three companies on the record as each company's consumption of brown paper. Moreover, as partial AFA for Gangyuan's, Andrew's, and Tongzhou's steel scrap sales, we have not granted them a by-product offset for the final determination. *See Shaoxing Final Analysis Memo* for further details of the normal value calculation.

Finally, for the final determination, in accordance with sections 776(a)(2)(A), and (B) of the Act, we have determined that the use of partial neutral FA is required for the Shaoxing Metal Companies' direct labor and packing labor because assembly labor was incorrectly included in Gangyuan's and Andrew's packing labor. *See Shaoxing Final Analysis Memo*; *see also* the Shaoxing Metal Verification Report, at 43 and Verification Exhibit 17. As partial FA for the Shaoxing Metal Companies' direct labor and packing labor, we have calculated direct labor, which includes assembly labor, using the total number of direct labor hours for April 2007, and calculated packing labor, not including assembly labor, using the total number of packing labor hours for April 2007. *See Shaoxing Final Analysis Memo* for further details of the normal value calSculation.

**Verification**

As provided in section 782(i) of the Act, we verified the information submitted by the respondents for use in our final determination. *See* the Department's verification reports on the record of this investigation in the CRU with respect to Shanghai Wells and the Shaoxing Metal Companies. For both verified companies, we used standard verification procedures, including examination of relevant accounting and production records, as well as original source documents provided by respondents.

**Surrogate Country**

In the *Preliminary Determination,* we stated that we had selected India as the appropriate surrogate country to use in this investigation for the following reasons: (1) It is a significant producer of comparable merchandise; (2) it is at a similar level of economic development pursuant to 773(c)(4) of the Act; and (3) we have reliable data from India that we can use to value the factors of production. *See Preliminary Determination,* 73 FR at 15728–15729. For the final determination, we received no comments and made no changes to our findings with respect to the selection of a surrogate country.

**Separate Rates**

In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. *See Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991) (''*Sparklers*''), as amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*''), and Section 351.107(d) of the Department's regulations.

In the *Preliminary Determination,* we found that Shanghai Wells, the Shaoxing Metal Companies, and certain separate rate applicants who received a separate rate [6] (''Separate Rate Recipients'') in the *Preliminary Determination* demonstrated their eligibility for separate-rate status. For the final determination, we continue to find that the evidence placed on the record of this investigation by Shanghai Wells, the Shaoxing Metal Companies, and the Separate Rate Recipients demonstrate both a *de jure* and *de facto*

[6] These companies are: Jiangyin Hongji Metal Products Co., Ltd, Shaoxing Meideli Metal Hanger Co., Ltd., Shaoxing Dingli Metal Clotheshorse Co., Ltd., Shaoxing Liangbao Metal Manufactured Co. Ltd., Shaoxing Zhongbao Metal Manufactured Co. Ltd., Shangyu Baoxiang Metal Manufactured Co. Ltd., Zhejiang Lucky Cloud Hanger Co., Ltd., Pu Jiang County Command Metal Products Co., Ltd., Shaoxing Shunji Metal Clotheshorse Co., Ltd., Ningbo Dasheng Hanger Ind. Co., Ltd., Jiaxing Boyi Medical Device Co., Ltd., Yiwu Ao-Si Metal Products Co., Ltd., and Shaoxing Guochao Metallic Products Co., Ltd.

absence of government control, with respect to their respective exports of the merchandise under investigation, and, thus are eligible for separate rate status.

In the *Preliminary Determination,* the Department denied a separate rate to Tianjin Hongtong Metal Manufacture Co., Ltd. (''Hongtong'') because it was unable to demonstrate that it had sales of the merchandise under consideration to the United States. We found that Hongtong was a producer and not an exporter of the merchandise under consideration during the POI and, therefore, was not eligible to receive a separate rate in this investigation. See *Preliminary Determination,* 73 FR at 15730–31. The Department has not received any information from Hongtong contrary to our preliminary finding. Therefore, we continue to find that Hongtong is not eligible to receive a separate rate in this investigation.

Lastly, we are calculating the separate rate based on the simple average of the two mandatory respondents because using a weighted average risks disclosure of business proprietary information. *See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review,* 73 FR 34251, 34252 (June 17, 2008); Memorandum to the File, from Irene Gorelik, Senior Analyst, Office 9, Import Administration, Subject: Investigation of Steel Wire Garment Hangers from the People's Republic of China: Final Simple-Averaged Margin for Separate Rate Companies, (August 7, 2008) at Attachment I.

**The PRC-Wide Rate**

In the *Preliminary Determination,* the Department stated that information on the record of this investigation indicates that there are numerous producers/exporters of hangers in the PRC. As stated in the *Preliminary Determination,* the Department collected CBP data to select respondents based on imports of hangers classified under HTSUS subheading 7326.20.00.20. *See Preliminary Determination,* 73 FR at 15731. Furthermore, upon receipt of separate-rates applications, we examined the CBP data and determined that a significant number of exporters of hangers from the PRC during the POI were neither selected for review nor filed separate-rate applications; thus, we determined that PRC exporters of hangers are not active participants in this investigation. Based upon our knowledge of the volume of imports of the merchandise under consideration from the PRC from CBP data, the volume of imports of the merchandise under consideration from Shanghai Wells, the Shaoxing Metal Companies, and the separate-rate applicants, while accounting for a significant share, do not account for all imports into the United States. Therefore, the Department continues to determine that there were PRC producers/exporters of the merchandise under consideration during the POI that did not apply for separate rates, thus establishing that there is a PRC-Wide entity with respect to this product. Therefore, consistent with the presumption of government control, we continue to determine that some exports of subject merchandise are from entities under the control of the PRC-Wide entity. The Department's presumption that these entries were subject to government control has not been rebutted since the *Preliminary Determination,* thus we continue to determine that these entries should be assessed a single PRC-Wide antidumping duty rate.

As the single PRC-Wide rate, we have taken the simple average of: (A) The weighted-average of the calculated rates for the Shaoxing Metal Companies and Shanghai Wells and (B) a simple average of petition rates based on U.S. prices and normal values within the range of the U.S. prices and normal values calculated for the Shaoxing Metal Companies and Shanghai Wells. This rate applies to all entries of the merchandise under investigation with the exception of those entries from Shanghai Wells, the Shaoxing Metal Companies, and the Separate-Rate Recipients. *See Amended Preliminary Determination,* 73 FR at 20020.

**Final Determination Margins**

We determine that the following percentage weighted-average margins exist for the POI:

STEEL WIRE GARMENT HANGERS FROM THE PRC—FINAL DUMPING MARGINS

| Exporter & Producer | Weighted-average deposit rate (percent) |
|---|---|
| Shanghai Wells Hanger Co., Ltd. | 15.44 |
| Shaoxing Metal Companies | 94.06 |
| Jiangyin Hongji Metal Products Co., Ltd | 54.75 |
| Shaoxing Meideli Metal Hanger Co., Ltd. | 54.75 |
| Shaoxing Dingli Metal Clotheshorse Co., Ltd. | 54.75 |
| Shaoxing Liangbao Metal Manufactured Co. Ltd. | 54.75 |
| Shaoxing Zhongbao Metal Manufactured Co. Ltd. | 54.75 |
| Shangyu Baoxiang Metal Manufactured Co. Ltd. | 54.75 |
| Zhejiang Lucky Cloud Hanger Co., Ltd. | 54.75 |
| Pu Jiang County Command Metal Products Co., Ltd. | 54.75 |
| Shaoxing Shunji Metal Clotheshorse Co., Ltd. | 54.75 |
| Ningbo Dasheng Hanger Ind. Co., Ltd. | 54.75 |
| Jiaxing Boyi Medical Device Co., Ltd. | 54.75 |
| Yiwu Ao-Si Metal Products Co., Ltd. | 54.75 |
| Shaoxing Guochao Metallic Products Co., Ltd. | 54.75 |
| PRC-Wide Rate [7] | 186.98 |

[7] The PRC-Wide entity includes Tianjin Hongtong Metal Manufacture Co. Ltd.

**Disclosure**

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

**Retroactive Application of Amended Preliminary Determination Cash Deposits**

For all entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the *Preliminary Determination,* March 25, 2008, and before the publication date of the *Amended Preliminary Determination,* April 14, 2008, we will instruct CBP to apply the cash deposit rates from the *Amended Preliminary Determination. See* Issues and Decision Memorandum at Comment 8H.

**Continuation of Suspension of Liquidation**

We will instruct CBP to continue the suspension of liquidation required by section 735(d)(2) of the Act, of all entries of subject merchandise from Shanghai Wells, the Shaoxing Metal Companies, the Separate-Rate Recipients and the PRC-wide entity entered, or withdrawn from warehouse, for consumption on or after March 25, 2008, the date of publication of the *Preliminary Determination.* CBP shall continue to require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. *See* section 735(c)(1)(B)(ii) of the Act. The suspension of liquidation instructions will remain in effect until further notice.

**ITC Notification**

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (''ITC'') of our final determination of sales at LTFV. As our final determination is affirmative, in accordance with section 735(b)(2) of the Act, within 45 days the ITC will determine whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. *See* section 735(c)(2) of the Act. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation. *See id.;* section 736 of the Act.

**Notification Regarding APO**

This notice also serves as a reminder to the parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination and notice are issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: August 7, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

**Appendix I—Discussion of the Issues**

I. *General Issues*
- Comment 1: Scope
- Comment 2: Treatment of Drawing Powder

*Surrogate Values*
- Comment 3: Financial Ratios
- Comment 4: Wire Rod Surrogate Value
- Comment 5: Coating Powder and Glue Surrogate Values
- Comment 6: Wage Rate
- Comment 7: Steel Scrap Offset Surrogate Value

*Company Specific Comments*
- Comment 8: Shaoxing Metal Companies [8]
- A. Total Adverse Facts Available (''AFA'') for the Shaoxing Metal Companies
- B. Total AFA for Quantity and Value (''Q&V'') of U.S. Sales
- C. Partial AFA for Sales Trace A[9]
- D. Partial AFA for Water
- E. Partial AFA for White Paper, Brown Paper, and Steel Scrap Sales
- F. Reporting of Wire and Wire Rod
- G. Management and Administrative Labor
- H. Retroactive Implementation of Amended Preliminary Determination

Comment 9: Shaghai Wells [10]
- A. Demurrage Revenue
- B. Commission Revenue
- C. Wells USA's Indirect Selling Expenses
- D. Treatment of Water and Lubricant Lard
- E. Treatment of Market Economy (''ME'') Purchase
- F. Elimination of Credit Expenses from Constructed Export Price (''CEP'') Profit
- G. Sales to Customer X: Export Price (''EP'') or CEP [11]
- H. Payment Terms
- I. Truck Freight and Brokerage

[FR Doc. E8–18851 Filed 8–13–08; 8:45 am]

**BILLING CODE 3510–DS–P**

[8] The Shaoxing Metal Companies consist of: Shaoxing Gangyuan Metal Manufactured Co., Ltd. (''Gangyuan''), Shaoxing Andrew Metal Manufactured Co., Ltd. (''Andrew''), Shaoxing Tongzhou Metal Manufactured Co., Ltd. (''Tongzhou''), and Company X. The Department normally does not consider a respondent's supplier's name to be business proprietary information. However, in this instance, counsel for the Shaoxing Metal Companies bracketed this information as business proprietary and the Department did not challenge this treatment. *See* Memorandum to the File from Julia Hancock, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Steel Wire Garment Hangers from the People's Republic of China: Shaoxing Metal Companies, (August 7, 2008) (''Shaoxing Final Analysis Memo'') for more information regarding the identify of this company; Shaoxing Metal Companies' Request for Collapsing, (February 26, 2008) at 15.

[9] Because of the proprietary information of this sales trace, for further information, please *see* the Shaoxing Metal Verification Report at 21.

[10] Shanghai Wells Hanger Co., Ltd. (''Shanghai Wells'').

[11] The name of Customer X is business proprietary information. *See* Memorandum to the File from Irene Gorelik, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Steel Wire Garment Hangers from the People's Republic of China: Shanghai Wells, (August 7, 2008) (''Shanghai Wells Final Analysis Memo'') for more information regarding the identity of this customer.

## DEPARTMENT OF DEFENSE

### Department of the Air Force

### Notice of Intent To Grant an Exclusive Patent License

**AGENCY:** Department of the Air Force.

**ACTION:** Notice.

**SUMMARY:** Pursuant to the provisions of Part 404 of Title 37, Code of Federal Regulations, which implements Public Law 96–517, as amended, the Department of the Air Force announces its intention to grant Parhelion Labs, Incorporated in the State of California, having a place of business at 1660 S. Amphlett Blvd., Suite 350, San Mateo, California 94402, an exclusive license in any right, title and interest the Air Force has in:

U.S. Patent No. 6,497,718, issued December 24, 2002, entitled ''Process for phase-locking human ovulation/menstrual cycles'' by Edmond M. Dewan.

**DATES:** A license for this patent will be granted unless a written objection is received within fifteen (15) days from the date of publication of this Notice.

**FOR FURTHER INFORMATION CONTACT:** Written objection should be sent to: James M. Skorich, Esq., 2251 Maxwell Ave., SE., 377th ABW/JAN Kirtland

AFB NM 87117–5773. Telephone: (505) 846–1542.

**Bao-Anh Trinh,**

*Air Force Federal Register Liaison Officer.*

[FR Doc. E8–18815 Filed 8–13–08; 8:45 am]

**BILLING CODE 5001–05–P**

## DEPARTMENT OF DEFENSE

### Department of the Air Force

### Undersecretary of the Air Force, National Security Space Office; Positioning, Navigation, and Timing Architecture Industry Day To Inform Industry of the National Positioning, Navigation, and Timing Architecture and Planning by the Government for Transition to the Architecture

**AGENCY:** National Security Space Office (NSSO), Undersecretary of the Air Force, United States Air Force.

**ACTION:** Notice of meeting.

**SUMMARY:** The NSSO, in conjunction with the Department of Transportation Research and Innovative Technology Administration (DOT/RITA) and the Office of the Assistant Secretary of Defense for Networks and Information Integration (OASD(NII)) will be conducting an Industry Day presentation to introduce the National Positioning, Navigation, and Timing (PNT) Architecture and to discuss architecture transition planning.

**DATES:** The Industry Day will be held on September 16, 2008 in conjunction with the 2008 Institute of Navigation (ION) Global Navigation Satellite System (GNSS) conference. The meeting on September 16 will be held from 1–4 p.m., consisting of a two hour presentation on the National PNT Architecture pertaining to industry input, followed by a question and answer session. Interested parties may arrange follow-up discussions with government representatives at that time. Additionally, a 30-minute government overview of the National PNT Architecture will be presented at the Civil GPS Service Interface Committee (CGSIC) meeting on September 15.

**ADDRESSES:** The meeting location for the Industry Day on September 16 is Rooms 105 and 106 at the Savannah International Trade and Convention Center, One International Drive, Savannah, Georgia. The CGSIC meeting location on September 15 is at the Savannah Marriott Waterfront, 100 General McIntosh Road, Savannah, Georgia.

**FOR FURTHER INFORMATION CONTACT:** LCDR Jeffrey Vicario, (571) 432–1535, *jeffrey.vicario@osd.mil*.

**SUPPLEMENTARY INFORMATION:** DOT/RITA and OASD(NII), in coordination with other government agencies, have recently completed the development of a National Positioning, Navigation, and Timing (PNT) Architecture. The Architecture establishes the vision of U.S. global leadership in PNT, a strategy to achieve the vision, major vectors within the strategy, and recommendations to implement the vectors. The Industry Day presents an opportunity for vendors to become familiar with the PNT Architecture, to understand how it incorporates industry perspectives, to make company perspectives known to the government, and to engage in discussion with the government regarding its plans to transition to the Architecture.

**Bao-Anh Trinh,**

*Air Force Federal Register Liaison Officer.*

[FR Doc. E8–18814 Filed 8–13–08; 8:45 am]

**BILLING CODE 5001–05–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

August 11, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* RP08–84–002.

*Applicants:* Southern Star Central Gas Pipeline, Inc.

*Description:* Southern Star Central Gas Pipeline, Inc submits 1st Rev Seventh Revised Sheet 12 to FERC Gas Tariff, Original Volume 1, to become effective 6/1/08 in compliance with the Commission's 7/3/08 Order.

*Filed Date:* 07/09/2008.

*Accession Number:* 20080711–0002.

*Comment Date:* 5 p.m. Eastern Time on Thursday, August 14, 2008.

*Docket Numbers:* RP08–467–000.

*Applicants:* Enbridge Pipelines (AlaTenn) L.L.C.

*Description:* Request of Enbridge Pipelines (AlaTenn) L.L.C. for Extension of Time to Implement an Electronic Short-Term Capacity Release Bidding System.

*Filed Date:* 07/30/2008.

*Accession Number:* 20080730–5011.

*Comment Date:* 5 p.m. Eastern Time on Thursday, August 14, 2008.

*Docket Numbers:* RP08–468–000.

*Applicants:* Texas Gas Transmission. LLC.

*Description:* Request for Limited Waiver of Order No. 712 Implementation Date of Texas Gas Transmission, LLC.

*Filed Date:* 07/30/2008.

*Accession Number:* 20080730–5048.

*Comment Date:* 5 p.m. Eastern Time on Thursday, August 14, 2008.

*Docket Numbers:* RP08–492–000.

*Applicants:* Iroquois Gas Transmission Systems, L.P.

*Description:* Iroquois Gas Transmission System, LP submits its Twentieth Revised Sheet 4A to FERC Gas Tariff, First Revised Volume 1, to be effective 10/1/08.

*Filed Date:* 08/08/2008.

*Accession Number:* 20080811–0086.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, August 20, 2008.

*Docket Numbers:* RP08–493–000.

*Applicants:* Paiute Pipeline Company.

*Description:* Paiute Pipeline Co submits Eighteenth Revised Sheet 10 to FERC Gas Tariff, Second Revised Volume 1–A.

*Filed Date:* 08/08/2008.

*Accession Number:* 20080811–0085.

*Comment Date:* 5 p.m. Eastern Time on Wednesday, August 20, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies

of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. E8–18829 Filed 8–13–08; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2003–0052; FRL–8704–3]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; Risk Management Program Requirements and Petitions To Modify the List of Regulated Substances Under Section 112(r) of the Clean Air Act (CAA).; EPA ICR No. 1656.13; OMB Control No. 2050–0144

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on January 31, 2009. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before October 14, 2008.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–2003–0052, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* Air Docket, Environmental Protection Agency, Mail code: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2003–0052. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

**FOR FURTHER INFORMATION CONTACT:** Sicy Jacob, Office of Emergency Management, Mail code 5104A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–8019; fax number: 202–564–2625; e-mail address: *jacob.sicy@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2003–0052 which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air Docket is 202–566–1742.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

### What Information Is EPA Particularly Interested In?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

### What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under DATES.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

**What Information Collection Activity or ICR Does This Apply To?**

Docket ID No. EPA–HQ–OAR–2003–0052.

*Affected entities:* Entities potentially affected by this action are chemical manufacturers, petroleum refineries, water treatment systems, non-chemical manufacturers, etc

*Title:* Risk Management Program Requirements and Petitions to Modify the List of Regulated Substances under Section 112(r) of the Clean Air Act.

*ICR number:* EPA ICR No. 1656.13, OMB Control No. 2050–0144.

*ICR status:* This ICR is currently scheduled to expire on January 31, 2009. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* The 1990 CAA Amendments added section 112(r) to provide for the prevention and mitigation of accidental releases. Section 112(r) mandates that EPA promulgate a list of ''regulated substances'' with threshold quantities and establish procedures for the addition and deletion of substances from the list of regulated substances. Processes at stationary sources that contain more than a threshold quantity of a regulated substance are subject to accidental release prevention regulations promulgated under CAA section 112(r)(7). These two rules are codified as 40 CFR part 68. Part 68 requires that sources with more than a threshold quantity of a regulated substance in a process develop and implement a risk management program and submit a risk management plan to EPA. The compliance schedule for the part 68 requirements was established by rule on June 20, 1996. Burden to sources that are currently covered by part 68, for initial rule compliance, including rule familiarization and program implementation was accounted for in previous ICRs. Sources submitted their first RMPs on June 21, 1999. The next compliance deadline for most sources was June 21, 2004, five years after the first submission. Some sources revised and submitted their RMPs between the five-year deadlines. These sources were then assigned a new five-year compliance deadline based on the date of their revised plan submission. The next submission deadline of RMPs for most sources is June 21, 2009. However, as only some regulated entities have a compliance deadline of June 2009, the remaining sources have been assigned a deadline in 2010, 2011, 2012 or 2013 (the last two years are after the period covered by this ICR) based on the date of their most recent submission. The period covered by this ICR includes the regulatory reporting deadline, June 2009. In this ICR, EPA has accounted burden for new sources that may become subject to the regulations, currently covered sources with compliance deadlines in this ICR period (2009 to 2011), sources that are out of compliance since the last regulatory deadline but are expected to comply during this ICR period, and sources that have deadlines beyond this ICR period but are required to comply with certain prevention program documentation requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Burden Statement:* The public reporting burden will depend on the size of the sources complying with 40 CFR part 68 requirements. In this ICR, the public reporting burden for rule familiarization for new sources is estimated to range from 12 to 32 hours per source. The public reporting burden to prepare and submit a RMP for new sources is estimated to range from 8.25 to 33 hours. The public reporting burden for new sources to develop a prevention program is estimated to range from 7 to 188 hours per source. The public reporting burden for those sources that claim CBI is estimated to be 9.5 hours per source. The public reporting burden for currently covered sources to prepare and submit RMP is estimated to range from 5 to 28 hours. The public record keeping burden to maintain on-site documentation for currently covered sources is estimated to range from 4.5 to 124 hours. The total annual public reporting burden for all sources is 84,729 hours (254,187 hours over three years). The total annual burden estimated for 16 implementing agencies is 9,253 hours (27,759 hours for three years). Therefore, the total annual burden for all sources and states is estimated to be 93,982 hours (281,946 hours for three years).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 13,718 for this ICR period.

*Frequency of response:* Every five years, unless the facilities need to

update their previous submission earlier to comply with a rule requirement.

*Estimated total average number of responses for each respondent:* one.

*Estimated total annual burden hours:* 93,982 hours including burden for implementing agencies.

*Estimated total annual costs:* $9,785,371.00. There are no capital or operating and maintenance costs associated with this ICR since all sources are required to submit RMPs on-line using the new electronic reporting system, RMP e*submit.

There is a decrease of 4,617 hours for all sources and states from the previous ICR. There are two primary reasons for this decrease in burden. First, as explained in section 1 of the supporting statement for this ICR renewal (the supporting statement is available at *http://www.regulations.gov*), the burden varies from ICR to ICR due to different compliance deadlines based on the sources' RMP re-submission deadlines and other regulatory deadlines. Therefore, the burden increases or decreases each year depending on how many sources have to submit their RMP and comply with certain prevention program requirements. Second, the number of sources subject to the regulations is lower than in the previous ICR (16,634 in the previous ICR and 13,718 sources in this ICR period).

**What Is the Next Step in the Process for This ICR?**

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: August 7, 2008.

**Deborah Y. Dietrich,**

*Director, Office of Emergency Management.*

[FR Doc. E8–18840 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8704–4]**

## Clean Water Act Section 303(d): Final Agency Action on 27 Arkansas Total Maximum Daily Loads (TMDLs)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability.

**SUMMARY:** This notice announces the final agency action on 27 TMDLs established by EPA Region 6 for waters listed in the State of Arkansas, under section 303(d) of the Clean Water Act (CWA). These TMDLs were completed in response to the lawsuit styled *Sierra Club, et al.* v. *Clifford, et al.*, No. LR–C–99–114. Documents from the administrative record files for the final 27 TMDLs, including TMDL calculations may be viewed at *www.epa.gov/region6/water/npdes/tmdl/index.htm.*

**ADDRESSES:** The administrative record files for these 27 TMDLs may be obtained by writing or calling Ms. Diane Smith, Environmental Protection Specialist, Water Quality Protection Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, TX 75202–2733. Please contact Ms. Smith to schedule an inspection.

**FOR FURTHER INFORMATION CONTACT:** Diane Smith at (214) 665–2145.

**SUPPLEMENTARY INFORMATION:** In 1999, five Arkansas environmental groups, the Sierra Club, Federation of Fly Fishers, Crooked Creek Coalition, Arkansas Fly Fishers, and Save our Streams (plaintiffs), filed a lawsuit in Federal Court against the EPA, styled *Sierra Club, et al.* v. *Clifford, et al.*, No. LR–C–99–114. Among other claims, plaintiffs alleged that EPA failed to establish Arkansas TMDLs in a timely manner.

**EPA Takes Final Agency Action on 27 TMDLs**

By this notice EPA is taking final agency action on the following 27 TMDLs for waters located within the State of Arkansas:

| Segment-reach | Waterbody name | Pollutant |
|---|---|---|
| 08040102–016 | Caddo River | Copper and Zinc. |
| 08040102–018 | Caddo River | Copper and Zinc. |
| 08040102–019 | Caddo River | Copper and Zinc. |
| 08040102–023 | South Fork Caddo R. | Copper and Zinc. |
| 08040203–904 | Big Creek | Lead and Turbidity. |
| 08040205–001 | Bayou Bartholomew | TDS, Chloride, and Sulfate. |
| 08040205–002 | Bayou Bartholomew | TDS, Chloride, and Sulfate. |
| 08040205–007 | Cutoff Creek | Turbidity. |
| 08040205–012U | Bayou Bartholomew | TDS, Chloride, and Sulfate. |
| 08040205–013 | Bayou Bartholomew | TDS, Chloride, and Sulfate. |
| 08040101–048 | Prairie Creek | Turbidity. |
| 08040201–001U | Moro Creek | Turbidity. |
| 08040201–001L | Moro Creek | Turbidity. |
| 08040204–005 | Big Creek | Turbidity. |

EPA requested the public to provide EPA with any significant data or information that might impact the 27 TMDLs at **Federal Register** Notice: Volume 72, Number 241, pages 71409 and 71410 (December 17, 2007). The received comments were reviewed, and the EPA's response to comments and the TMDLs may be found at *http://www.epa.gov/region6/water/npdes/tmdl/index.htm.*

Dated: August 6, 2008.

**Miguel I. Flores,**

*Director, Water Quality Protection Division, EPA Region 6.*

[FR Doc. E8–18839 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8704–5]**

### Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended; Midway Village/Bayshore Park Site

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice, request for public comments.

**SUMMARY:** In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), as amended, 42 U.S.C. 9622(i), notice is hereby given of a proposed Administrative Agreement for Recovery of Past Response Costs (''Agreement,'' Region 9 Docket No. 2005–18) pursuant to Section 122(h) of CERCLA concerning the Midway Village/Bayshore Park Site (the ''Site''), located in Daly City, San Mateo County, California. The settling parties to the Agreement include Pacific Gas & Electric Company (''PG&E''), the U.S. Department of Housing and Urban Development (''HUD''), and the U.S. Navy (''the Navy''). Through the proposed Agreement, PG&E will reimburse the United States $12,596.30 and HUD and the Navy will reimburse the United States $113,366.66 in response costs incurred at a portion of the Site. The Agreement provides the settling parties with a covenant not to sue for these past response costs, but does not limit EPA's ability to pursue the settling parties for future costs or for past response costs incurred at the portion of the Site not covered in the Agreement. For thirty (30) days following the date of publication of this Notice, the Agency will receive written comments relating to the proposed Agreement. The Agency's response to any comments received will be available for public inspection at EPA's Region IX offices, located at 75 Hawthorne Street, San Francisco, California 94105.

**DATES:** Comments must be submitted on or before September 15, 2008.

**ADDRESSES:** The proposed Agreement may be obtained from Sara Goldsmith, in the Office of Regional Counsel, telephone (415) 972–3931. Comments regarding the proposed Agreement should be addressed to Sara Goldsmith at the U.S. Environmental Protection Agency (ORC–3), 75 Hawthorne Street, San Francisco, California 94105, and should reference the Midway Village/Bayshore Park Site, and Region IX Docket No. 2005–18.

**FOR FURTHER INFORMATION CONTACT:** Sara Goldsmith, Office of Regional Counsel, (415) 972–3931, U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

Dated: August 5, 2008.

**Nancy Lindsey,**

*Acting Director, Superfund Division.*

[FR Doc. E8–18838 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8704–2]**

### Meeting of the Mobile Sources Technical Review Subcommittee

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Mobile Sources Technical Review Subcommittee (MSTRS) will meet in September 2008. The MSTRS is a subcommittee under the Clean Air Act Advisory Committee. This is an open meeting. The meeting will include discussion of current topics and presentations about activities being conducted by EPA's Office of Transportation and Air Quality. The preliminary agenda for the meeting and any notices about change in venue will be posted on the Subcommittee's Web site: *http://www.epa.gov/air/caaac/mobile_sources.html*. MSTRS listserver subscribers will receive notification when the agenda is available on the Subcommittee Web site. To subscribe to the MSTRS listserver, send a blank e-mail to *lists-mstrs@lists.epa.gov*.

**DATES:** Wednesday September 17, 2008 from 9 a.m. to 5 p.m. Registration begins at 8:30 a.m.

**ADDRESSES:** The meeting will be held at the Doubletree Hotel Crystal City-National Airport, 300 Army Navy Drive, Arlington, VA 22202–2891. Phone 703–416–4100. The hotel is located three blocks from the Pentagon City Metro station, and shuttle buses are available to and from both the Metro station and Washington Reagan National Airport.

**FOR FURTHER INFORMATION CONTACT:**

*For technical information:* John Guy, Designated Federal Officer, Transportation and Regional Programs Division, Mailcode 6405J, U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460; Ph: 202–343–9276; e-mail: *guy.john@epa.gov.*

*For logistical and administrative information:* Ms. Cheryl Jackson, U.S. EPA, Transportation and Regional Programs Division, Mailcode 6405J, U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460; 202–343–9653; e-mail: *jackson.cheryl@epa.gov.*

Background on the work of the Subcommittee is available at: *http://www.epa.gov/air/caaac/mobile_sources.html*. Individuals or organizations wishing to provide comments to the Subcommittee should submit them to Mr. Guy at the address above by September 3, 2008. The Subcommittee expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

**SUPPLEMENTARY INFORMATION:** During the meeting, the Subcommittee may also hear progress reports from some of its workgroups as well as updates and announcements on activities of general interest to attendees.

*For Individuals with Disabilities:* For information on access or services for individuals with disabilities, please contact Mr. Guy or Ms. Jackson (see above). To request accommodation of a disability, please contact Mr. Guy or Ms. Jackson, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: August 8, 2008.

**Christopher Grundler,**

*Acting Director, Office of Transportation and Air Quality.*

[FR Doc. E8–18823 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8704–9]**

### Conference Call of the Total Coliform Rule Distribution System Advisory Committee—Notice of Public Conference Call

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** Under Section 10(a)(2) of the Federal Advisory Committee Act, the United States Environmental Protection Agency (EPA) is giving notice of a conference call of the Total Coliform Rule Distribution System Advisory Committee (TCRDSAC). The purpose of this conference call is to discuss the Total Coliform Rule (TCR) revision and information about distribution systems issues that may impact water quality.

The TCRDSAC advises and makes recommendations to the Agency on revisions to the TCR, and on what information should be collected, research conducted, and/or risk management strategies evaluated to better inform distribution system contaminant occurrence and associated public health risks.

During this conference call the TCRDSAC will continue the Committee's discussions related to revisions to the draft Agreement in Principle (AIP), which includes recommended revisions to the TCR and recommendations for research and information collection to better understand and address possible public health impacts from potential degradation of drinking water quality in the distribution system.

**DATES:** The public conference call will be held on Wednesday, September 3, 2008 (1 p.m. to 4:30 p.m., Eastern Time (ET)). Attendees should register for the conference call to receive the call in information by calling Kate Zimmer at (202) 965–6387 or by e-mail to *kzimmer@resolv.org* no later than August 29, 2008.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact Kate Zimmer of RESOLVE at (202) 965–6387. For technical inquiries, contact Sean Conley (*conley.sean@epa.gov,* (202) 564–1781), Standards and Risk Management Division, Office of Ground Water and Drinking Water (MC 4607M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; fax number: (202) 564–3767.

**SUPPLEMENTARY INFORMATION:** The conference call is open to the public. The Committee encourages the public's input and will accept written statements. Any person who wishes to file a written statement can do so before or after a Committee meeting or conference call. Written statements received by August 29, 2008, will be distributed to all members before any final discussion or vote is completed. Any statements received on or after August 30, 2008, will become part of the permanent meeting and conference call file and will be forwarded to the members for their information.

**Special Accommodations**

For information on access or accommodations for individuals with disabilities, please contact Crystal Rodgers-Jenkins at (202) 564–5275 or by e-mail at *rodgers-jenkins.crystal@epa.gov.* Please allow at least 10 days prior to the conference call to give EPA time to process your request.

Dated: August 8, 2008.

**Cynthia Dougherty,**

*Director, Office of Ground Water and Drinking Water.*

[FR Doc. E8–18834 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8704–6]**

### Tentative Approval and Solicitation of Request for a Public Hearing for Public Water Supply Supervision Program Revision for the Commonwealth of Puerto Rico

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Commonwealth of Puerto Rico is revising its approved Public Water Supply Supervision Program. The EPA has determined that these revisions are no less stringent than the corresponding Federal regulations. Therefore, the EPA intends to approve these program revisions. All interested parties may request a public hearing.

**DATES:** This determination to approve Puerto Rico's primacy program revision application is made pursuant to 40 CFR 142.12(d)(3). It shall become final and effective unless (1) a timely and appropriate request for a public hearing is received or (2) the Regional Administrator elects to hold a public hearing on his own motion. Any interested person, other than Federal Agencies, may request a public hearing. A request for a public hearing must be submitted to the Regional Administrator at the address shown below by September 15, 2008. If a substantial request for a public hearing is made within the requested thirty day time frame, a public hearing will be held and a notice will be given in the **Federal Register** and a newspaper of general circulation. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective September 15, 2008.

**ADDRESSES:** Any request for a public hearing shall include the following information: (1) Name, address and telephone number of the individual, organization or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement on information that the requesting person intends to submit at such hearing; (3) the signature of the individual making the requests or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity. Requests for Public Hearing shall be addressed to: Regional Administrator, U.S. Environmental Protection Agency—Region 2, 290 Broadway, New York, New York 10007–1866.

All documents relating to this determination are available for inspection between the hours of 9 a.m. and 4:30 p.m., Monday through Friday, at the following offices:

Puerto Rico Department of Health, Public Water Supply Supervision Program, 9th Floor—Suite 903, Nacional Plaza Building, 431 Ponce De Leon Avenue, Hato Rey, Puerto Rico 00917.

U.S. Environmental Protection Agency—Region 2, 24th Floor Drinking Water Section, 290 Broadway, New York, New York 10007–1866.

**FOR FURTHER INFORMATION CONTACT:** Michael J. Lowy, Drinking Water Section, U.S. Environmental Protection Agency—Region 2, (212) 637–3830.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the United States Environmental Protection Agency (EPA) has determined to approve an application by the Commonwealth of Puerto Rico Department of Health to revise its Public Water Supply Supervision Primacy Program to incorporate regulations no less stringent than the EPA's National Primary

Drinking Water Regulations (NPDWR) for the following: Lead and Copper Rule; Minor Revisions; promulgated by EPA January 12, 2000 (65 FR 1950), Stage 2 Disinfectants and Disinfection Byproducts (Stage 2 DBPR); Final Rule; promulgated by EPA January 4, 2006 (71 FR 388), Long Term 2 Enhanced Surface Water Treatment (LT2); Final Rule; promulgated by EPA January 5, 2006 (71 FR 654), Correction to the Stage 2 Disinfectants and Disinfection Byproducts Rule; promulgated by EPA January 27, 2006 (71 FR 4644) and Correction to Stage 2; promulgated by EPA June 29, 2006 (71 FR 37168), and Correction to the LT2; promulgated by EPA January 30, 2006 (71 FR 4968) and Correction to the LT2; promulgated by EPA February 6, 2006 (71 FR 6136).

The application demonstrates that Puerto Rico has adopted drinking water regulations which satisfy the NPDWRs for the above. The USEPA has determined that Puerto Rico's regulations are no less stringent than the corresponding Federal Regulations and that Puerto Rico continues to meet all requirements for primary enforcement responsibility as specified in 40 CFR 142.10.

**Authority:** Section 1413 of the Safe Drinking Water Act, as amended, 40 U.S.C. 300g–2, and 40 CFR 142.10, 142.12(d) and 142.13.

Dated: July 25, 2008.

**Alan J. Steinberg,**

*Regional Administrator, Region 2.*

[FR Doc. E8–18837 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8704–7]**

## Sole Source Aquifer Designation of Conanicut Island, Narragansett Bay, RI

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of determination.

**SUMMARY:** The Regional Administrator of Region I of the Environmental Protection Agency (EPA) has determined, pursuant to section 1424(e) of the Safe Drinking Water Act, that the aquifer system that underlies Conanicut Island, Rhode Island is the sole or principal source of drinking water for this area and if the aquifer system were contaminated would create a significant hazard to public health. As a result of Sole Source Aquifer (SSA) designation, federal financially-assisted projects over the designated aquifer area will be subject to EPA review to ensure that these projects are designed and constructed so that they do not contaminate this aquifer so as to create a significant hazard to public health.

**DATES:** *Effective Date:* This determination shall become effective on August 14, 2008.

**ADDRESSES:** The data and record upon which these findings are based are available to the public and may be inspected during normal business hours at the U.S. Environmental Protection Agency—Region I, Office of Ecosystem Protection, One Congress Street, Suite 1100, Boston, MA 02114–2023.

**FOR FURTHER INFORMATION CONTACT:** Douglas Heath, U.S. EPA—Region I at the address above or at (617) 918–1585, e-mail: *heath.doug@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 1424(e) of the Safe Drinking Water Act, 42 U.S.C. 300h–3(e), states: ''If the Administrator determines, on his own initiative or petition, that an area has an aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health, he shall publish notice of that determination in the **Federal Register**. After the publication of any such notice, no commitment for federal financial assistance (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.''

On February 1, 2006, EPA Region I received a petition from the North End Concerned Citizens (NECC) requesting the designation of the aquifer system underlying Conanicut Island as a SSA. NECC subsequently submitted a revised petition. Among other things, the revised petition removed references to an original request that EPA review closure plans for a landfill and the location of a proposed Town Garage. On August 17, 2007, EPA completed its technical review of the completeness and adequacy of the petition. On February 13, 2008, EPA held a public meeting in Jamestown and invited public comment on the petition. The public comment period closed on March 19, 2008.

### II. Basis for Determination

Among the factors considered by the Regional Administrator as part of the review and technical verification process for designating an area under section 1424(e) were:

1. The aquifer system underlying Conanicut Island supplies the service area population with 50% or more of its drinking water needs. Approximately 57% of the island's residents rely solely on residential supply wells. The remaining 43% of residents rely on municipal water provided by the Jamestown Water District (a portion of which is also ground water extracted by bedrock wells) with a peak flow of 400,000 gallons per day.

2. There is no physical, legal and/or economical alternative drinking water source or combination of sources to meet all of the needs of the designated service area.

3. The EPA finds that the petition appropriately delineates the boundaries of the aquifer project review and service area. For purposes of this designation, EPA finds the Conanicut Island Aquifer System boundary is based on the mean high tide line since this marks the freshwater-saltwater boundary.

4. While the quality of the area's ground water is considered to be good, it is vulnerable to contamination due to the relatively thin soil cover and rapid movement of ground water in fractured rock, coupled with increasing development and other land uses. Recharge of the water supply is by infiltration of precipitation over the entire island. The designated area is underlain primarily by a fractured bedrock aquifer system. The aquifer system is overlain by areas of glacial till and soil deposits. Freshwater in bedrock fractures under the island forms a lens-shaped body that floats on saltwater as its density is less than that of saltwater. According to a 1997 study by the University of Rhode Island, the thickness of the freshwater lens is estimated to range from a few tens of feet near the shoreline to more than 500 feet in the central part of the island under non-pumping conditions.

### III. Description of the Conanicut Island Aquifer System That Underlies Conanicut Island

The Conanicut Island Aquifer System is a nine-square-mile island located in Narragansett Bay, Rhode Island. The island is divided into three land masses: North Island, Central Island, and Beavertail Peninsula. North Island rises to an elevation of about 140 feet above sea level and is characterized by parallel ridges running north-south which create

the Jamestown Brook Watershed. To the south, separated by Great Creek and extensive wetlands, is the Central Town area. The Central Island area is comprised of gently rolling hills up to 100 feet elevation with bedrock outcrops in the Dumplings and Fort Wetherill area. To the southwest is the Beavertail Peninsula rising to an elevation of 125 feet. The peninsula is connected to the rest of the island by a sandy isthmus called Mackerel Cove Beach.

The average annual precipitation is approximately 43 inches. The island's climate is moderated by the waters of Narragansett Bay and the Atlantic Ocean.

Conanicut Island's bedrock is terrestrial metasedimentary rock of Pennsylvanian age (approximately 300 million years old) in the north and the Cambrian-age Conanicut group in the center of the island and on Beavertail. Originally deposited as sediments ranging from coarse-grained gravel to fine-grained silt, these materials hardened over time into metamorphic rocks. Fort Wetherill on the southeastern portion of the island is underlain by Proterozoic Newport Formation granites. These are overlain by poorly-sorted glacial till ranging from 0 to about 45 feet in thickness. Because the rock and till transmit water very slowly, seasonally-high water table conditions occur throughout much of the island.

### IV. Information Utilized in Determination

The information utilized in this determination includes: The petition and supporting documents submitted by the NECC, letters received before and during the public comment period, and public comments received during the public hearing. In addition, much of the information has been derived from published literature on the hydrogeology and water resources of the region. This information is available to the public and may be inspected at the EPA Region I office in Boston, Massachusetts (address listed above). The petition and support document and EPA's response summary to public comment are also available at the Jamestown Public Library in Jamestown, Rhode Island.

### V. Summary and Discussion of Public Comments

Most comments received were in favor of the designation. Written comments in support were received from the Honorable Lincoln Chaffee, U.S. Senate; Senate Majority Leader M. Teresa Paiva Weed and House Deputy Minority Whip Bruce J. Long of the Rhode Island General Assembly; the Rhode Island Department of Health; the Rhode Island Department of Environmental Management; and 36 residents/households of Jamestown. On March 11, 2008, a majority of the Jamestown Conservation Commission voted to support the petition. On March 17, 2008, a majority of the Town Council approved a motion to support SSA designation. EPA received five written comments expressing opposition to the designation. Among these were letters from two members of the Town Council.

EPA has addressed the written comments received in a Responsiveness Summary, which is part of the record of this decision. The Responsiveness Summary is available at the EPA Region I offices and at the Jamestown Public Library.

### VI. Project Review

After the effective date of this designation, EPA will evaluate projects within the designation area that include federal financial assistance to determine whether the project may contaminate the aquifer so as to create a significant hazard to public health. Where practicable, EPA will offer comments as to how the project may be designed to protect the aquifer. EPA anticipates that few future projects will trigger SSA review. Where review is required, EPA will coordinate with state and local agencies and the project's developers. EPA will give their comments full consideration. Through its review, EPA will attempt to complement and support state and local ground water protection measures. Although the project review process cannot be delegated, EPA will rely to the maximum extent possible on any existing or future state and/or local control measures to protect the quality of ground water in the review area. EPA also will work to integrate any review with related reviews required pursuant to other federal laws, such as the National Environmental Policy Act (NEPA) as amended 42 U.S.C. 4321, *et seq.*, to avoid delay or duplication of effort.

**Authority:** This action is issued under the authority of section 1427 of the Safe Drinking Water Act as amended 42 U.S.C. 300h–3(e).

Dated: July 30, 2008.

**Ira Leighton,**

*Acting Regional Administrator, USEPA Region I.*

[FR Doc. E8–18836 Filed 8–13–08; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget, Comments Requested

August 6, 2008.

**SUMMARY:** As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before September 15, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Submit your comments to Nicholas A. Fraser, Office of Management and Budget (e-mail address: *nfraser@omb.eop.gov*), and to the Federal Communications Commission's PRA mailbox (e-mail address: *PRA@fcc.gov*). Include in the e-mails the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below or, if there is no OMB control number, the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by email contact the person listed below to make alternate arrangements.

**FOR FURTHER INFORMATION CONTACT:** For additional information contact Leslie F. Smith via email at *PRA@fcc.gov* or at

(202) 418–0217. To view or obtain a copy of an information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR you want to view (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0169.

*Title:* Sections 43.51 and 43.53—Reports and Records of Communications Common Carriers and Affiliates.

*Form Number:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Businesses or other for-profit.

*Number of Respondents and Responses:* 63 respondents; 1,218 responses.

*Estimated Time per Response:* 4.2 hours.

*Frequency of Response:* On occasion and annual reporting requirement; recordkeeping requirement; and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. *See* 47 CFR 43.51 and 43.53.

*Total Annual Burden:* 5,247 hours.

*Total Annual Cost:* None.

*Privacy Act Impact Assessment:* No impacts.

*Nature and Extent of Confidentiality:* The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* Section 43.51 (47 CFR 43.51) requires that any communications common carrier described in paragraph 43.51(b) file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and any amendments. Section 43.51 also requires carriers to maintain copies of certain contracts, to have them readily accessible to Commission staff and members of the public upon request and to forward individual contracts to the Commission as requested. Section 43.53 (47 CFR 43.53) requires each communications common carrier engaged directly in the transmission or reception of telegraph communications between the continental United States and any foreign country to file a report with the Commission within thirty (30) days of the date of any arrangement concerning the division of the total telegraph charges on such communications other than transiting.

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

[FR Doc. E8–18845 Filed 8–13–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget, Comments Requested

August 6, 2008.

**SUMMARY:** As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before September 15, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Submit your comments to Nicholas A. Fraser, Office of Management and Budget (e-mail address: *nfraser@omb.eop.gov*), and to the Federal Communications Commission's PRA mailbox (e-mail address: *PRA@fcc.gov*). Include in the e-mails the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below or, if there is no OMB control number, the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

**FOR FURTHER INFORMATION CONTACT:** For additional information contact Leslie F. Smith via e-mail at *PRA@fcc.gov* or at (202) 418–0217. To view or obtain a copy of an information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR you want to view (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–XXXX.

*Title:* Service Quality Measurement Plan for Interstate Special Access and Monthly Usage Reporting Requirements (272 Sunset Rulemaking).

*Form Number:* N/A.

*Type of Review:* New collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents and Responses:* 3 respondents; 48 responses annually.

*Estimated Time per Response:* 25–75 hours.

*Obligation to Respond:* Required to obtain or retain benefits. 47 U.S.C. 151, 152, 154(i), 154(j), 201–204, 214, 220(a), 251, 252, 271, 272, and 303(r).

*Frequency of Response:* Monthly and quarterly reporting requirements; third party disclosure.

*Total Annual Burden:* 3,000 hours.

*Total Annual Cost:* None.

*Privacy Act Impact Assessment:* No impact.

*Nature of Extent of Confidentiality:* The respondents may request confidentiality protection for the special access performance information. The respondents are not required to file their customers' monthly usage information with the Federal Communications Commission (FCC).

*Needs and Uses:* The service quality measurement plan for interstate special access would require the respondents to report special access performance metrics on a quarterly basis. Because, pursuant to Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services, WC Docket Nos. 02–112, 06–120, CC Docket No. 00–175, *Report and Order and Memorandum Opinion and Order,* 22 FCC Rcd 16440 (2007) (Section 272 Sunset Order), the respondents are no longer required to comply with the section 272 structural safeguards, the special access performance metrics reporting requirements will help ensure that these carriers do not engage in non-price discrimination in the provision of special access services to unaffiliated entities and will provide the FCC and other interested parties with reasonable tools to monitor these carriers' performance in providing these special access services to themselves and their competitors. The monthly usage reporting requirement would require the respondents to provide each of their residential customers who subscribe to a call plan that establishes a single rate for unlimited wireline local exchange and long distance telecommunications service with the total number of long distance telecommunications service minutes used by that customer each month. This monthly usage reporting requirement will help ensure that, as a result of the relief granted in the Section 272 Sunset Order residential interstate long distance consumers receive adequate information regarding their monthly usage in order to make informed choices among alternative long distance calling plans.

*OMB Control Number:* 3060–0760.

*Title:* 272 Sunset Order, WC Docket No. 06–120; Access Charge Reform, CC Docket No. 96–262 (First Report and Order); Second Order on Reconsideration and Memorandum Opinion and Order, and Fifth Report and Order.

*Form Number:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Businesses or other for-profit.

*Number of Respondents and Responses:* 17 respondents; 904 responses.

*Estimated Time per Response:* 3–300 hours.

*Frequency of Response:* On occasion and one time reporting requirements.

*Obligation to Respond:* Required to obtain or retain benefits. *See* 47 FR 69.727.

*Total Annual Burden:* 30,348 hours.

*Total Annual Cost:* $700,600.

*Privacy Act Impact Assessment:* No impacts.

*Nature and Extent of Confidentiality:* The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* Pursuant to the recently-released Section 272 Sunset Order, FCC 07–159, respondents are no longer required to comply with 47 U.S.C. 272 structural safeguards. As such, the respondents must now file certifications with the Commission prior to providing contract tariff services to itself or to any affiliate that is neither a section 272 nor a rule 64.1903 separate affiliate for use in the provision of any in-region, long distance services that it provides service pursuant to that contract tariff to an unaffiliated customer. The certification requirement will ensure, as a result of the relief granted in FCC 07–159, equivalent protection in the event the BOCs provide in-region, long distance services directly and will be less burdensome and less costly for these providers.

Please note that the Commission is republishing this notice in the **Federal Register** due to our determination that the initial publication contained several errors and that the methodology use to estimate the burdens should be revised. The initial publication was on July 24, 2008 (73 FR 43228). Also, the revisions to information collection 3060–0760 stem from the 272 Sunset Order that prompted the new information collection 30-day notice being published simultaneously.

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

[FR Doc. E8–18846 Filed 8–13–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 8, 2008.

**A. Federal Reserve Bank of Kansas City** (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

*1. First Western Financial, Inc.*, Denver, Colorado, to acquire 100 percent of the voting shares of First Western Trust Bank of Arizona, Scottsdale, Arizona (in organization).

Board of Governors of the Federal Reserve System, August 11, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–18828 Filed 8–13–08; 8:45 am]

**BILLING CODE 6210–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Meeting of the President's Council on Bioethics

**AGENCY:** Department of Health and Human Services, Office of Public Health and Science, The President's Council on Bioethics.

**ACTION:** Notice.

**SUMMARY:** The President's Council on Bioethics (Edmund D. Pellegrino, MD, Chairman) will hold its thirty-fourth meeting, at which it will discuss its projected white paper on ethical questions in medical care reform as well as hear and discuss presentations on two additional topics, i.e., exercises of conscience in the practice of the health professions and futility in clinical judgments at the end of life. Subjects discussed at past Council meetings (although not on the agenda for the September 2008 meeting) include: Therapeutic and reproductive cloning, assisted reproduction, reproductive genetics, neuroscience, aging retardation, organ transplantation, personalized medicine, and lifespan-extension. Publications issued by the Council to date include: *Human Cloning and Human Dignity: An Ethical Inquiry* (July 2002); *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (October 2003); *Being Human: Readings from the President's Council on Bioethics* (December 2003); *Monitoring Stem Cell Research* (January 2004), *Reproduction and Responsibility: The Regulation of New Biotechnologies* (March 2004), *Alternative Sources of Human Pluripotent Stem Cells: A White Paper* (May 2005), *Taking Care: Ethical Caregiving in Our Aging Society* (September 2005), and *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (March 2008). Reports are forthcoming on three topics: Controversies in the determination of death; organ donation, procurement, allocation, and transplantation; and newborn screening.

**DATES:** The meeting will take place Thursday, September 11, 2008, from 9 a.m. to 5 p.m., ET; and Friday, September 12, 2008, from 9 a.m. to noon, ET.

**ADDRESSES:** Hotel Palomar Arlington, 1121 North 19th Street, Arlington, VA 22209. Phone 703–351–9170.

**FOR FURTHER INFORMATION CONTACT:** Ms. Diane M. Gianelli, Director of Communications, The President's Council on Bioethics, 1425 New York Avenue, NW., Suite C100, Washington, DC 20005. Telephone: 202/296–4669. E-mail: *info@bioethics.gov.* Web site: *http://www.bioethics.gov.*

**SUPPLEMENTARY INFORMATION:** The meeting agenda will be posted at *http://www.bioethics.gov.* The Council encourages public input, either in person or in writing. At this meeting, interested members of the public may address the Council, beginning at 11:45 a.m. on Friday, September 12. Comments are limited to no more than five minutes per speaker or organization. As a courtesy, please inform Ms. Diane M. Gianelli, Director of Communications, in advance of your intention to make a public statement, and give your name and affiliation. To submit a written statement, mail or e-mail it to Ms. Gianelli at one of her contact addresses given above.

Dated: August 4, 2008.

**F. Daniel Davis,**

*Executive Director, The President's Council on Bioethics.*

[FR Doc. E8–18830 Filed 8–13–08; 8:45 am]

**BILLING CODE 4154–06–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–08–08AJ]**

### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–4766 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

**Proposed Project**

Focus Group Testing to Effectively Plan and Tailor Cancer Prevention and Control Communication Campaigns—New—Division of Cancer Prevention and Control (DCPC), National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The mission of CDC's Division of Cancer Prevention and Control (DCPC) is to reduce the burden of cancer in the United States through cancer prevention, reduction of risk, early detection, better treatment, and improved quality of life for cancer survivors. Toward this end, DCPC supports the scientific development, implementation, and evaluation of various health communication campaigns with an emphasis on specific cancer burdens. This process requires testing of messages, concepts, and materials prior to their final development and dissemination.

CDC requests OMB approval of a generic information collection request to develop and test cancer prevention and control messages, including, but not limited to, colorectal and gynecologic cancers. Because communication campaigns will vary according to the type of cancer, qualitative dimensions of the message, and the type of respondents, DCPC has developed a reference set of questions that can be tailored for use in a variety of focus group-based information collections. The discussion guide for each focus group will be drawn from the reference set of pre-approved questions.

Insights gained from the focus groups will assist in the development and/or refinement of messages and materials to ensure that the general public and other key audiences clearly understand the messages and are motivated to adopt the desired action. Screening information will be collected from potential respondents in order to identify those who represent key audiences for specific messages.

The average burden for participating in a focus group discussion will be two hours. Over a three-year period, DCPC will conduct or sponsor up to 72 focus groups per year with an average of 12 respondents each. There are no costs to respondents except their time. The total estimated annualized burden hours are 1,814.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|---|
| General Public | Screening Form | 1,382 | 1 | 3/60 |
| | Focus Group Guide | 691 | 1 | 2 |
| Health Care Providers | Screening Form | 346 | 1 | 3/60 |
| | Focus Group Guide | 173 | 1 | 2 |

Dated: August 5, 2008.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E8–18817 Filed 8–13–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60 Day–08–0006]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. Alternatively, to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Reports Clearance Officer, 1600 Clifton Road NE., MS-D74, Atlanta, Georgia 30333; comments may also be sent by e-mail to *omb@cdc.gov.*

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have a practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Statements in Support of Application of Waiver of Inadmissibility (0920–0006)—Extension—National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Section 212(a)(1) of the Immigration and Nationality Act states that aliens with specific health related conditions are ineligible for admission into the United States. The Attorney General may waive application of this inadmissibility on health-related grounds if an application for waiver is filed and approved by the consular office considering the application for visa. CDC uses this application primarily to collect information to establish and maintain records of waiver applicants in order to notify the U.S. Citizenship and Immigration Services when terms, conditions and controls imposed by waiver are not met. CDC is requesting approval from OMB to collect this data for another 3 years. There are no costs to respondents except their time to complete the application. The annualized burden for this data collection is 167 hours.

ESTIMATE OF ANNUALIZED BURDEN HOURS

| Form | Number of responses | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| Form CDC 4.422–1 | 200 | 1 | 10/60 | 33 |
| Form CDC 4.422–1a | 200 | 1 | 20/60 | 67 |
| Form CDC 4.422–1b | 200 | 1 | 20/60 | 67 |
| Total | | | | 167 |

Dated: August 5, 2008.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E8–18819 Filed 8–13–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–08–08BA]**

### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

**Proposed Project**

Active Bacterial Core Surveillance (ABCs) Projects—New—National Center for Immunization and Respiratory Diseases (NCIRD), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Active Bacterial Core surveillance (ABCs) is a core component of CDC's Emerging Infections Program Network (EIP), a collaboration between CDC, state health departments, and universities. ABCs is an active laboratory- and population-based surveillance system for six invasive bacterial pathogens of public health importance (group A and group B streptococcus, *Haemophilus influenzae, Neisseria meningitidis, Streptococcus pneumoniae,* and methicillin-resistant *Staphylococcus aureus*). Case finding is active and laboratory-based. Following the identification of cases, a standard case report is completed on all identified cases through medical record review. Data collection is performed differently in each surveillance area, for example, through the cooperation of on-site hospital personnel (*e.g.*, Infection Control Practitioners or Medical Records personnel); through medical record review or clinician interview by county health department personnel; or through medical record review by surveillance personnel. Case report forms are entered into a secure computerized database and maintained at each surveillance site. The computerized databases, with personal identifiers removed, are transmitted to CDC by the fifth of every month.

The data collection has important practical utility to the government as well as EIP populations and the American population as a whole. ABCs data is critical for documenting disease burden and describing the epidemiology of invasive bacterial disease, tracking trends in antimicrobial resistance, contributing to the development and evaluation of new vaccines, developing and assessing public health prevention measures, and improving overall public health practice. Current information on disease incidence is needed to study present and emerging disease problems. The ABCs surveillance system provides data for those engaged in research or medical practice, health education officials, and manufacturers of pharmaceutical products which may lead to effective prevention strategies and enhanced interventions.

Respondents for each of the data collection forms are state health departments (California, Colorado, Connecticut, Georgia, Maryland, Minnesota, New Mexico, New York, Oregon and Tennessee) who are recipients of funding through the EIP cooperative agreement. The number of responses is dependent on the number of cases that are identified. Number of ''responses'' for all case report forms must be estimated not knowing before hand how many cases will occur.

There are no costs to respondents other than their time. The total estimated annualized burden is 4918 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

| Form name | Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|---|
| ABCs Case Report Form | State Health Department | 10 | 809 | 20/60 |
| Invasive Methicillin-resistant Staphylococcus aureus ABCs Case Report Form. | State Health Department | 10 | 609 | 20/60 |
| ABCs Invasive Pneumococcal Disease in Children Case Report Form. | State Health Department | 10 | 41 | 10/60 |
| Neonatal Group B Streptococcal Disease Prevention Tracking Form. | State Health Department | 10 | 37 | 20/60 |

Dated: August 5, 2008.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E8–18820 Filed 8–13–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Annual Progress Report—University Centers for Excellence in Developmental Disabilities Education, Research, and Service

*OMB No.:* 0970–0289

*Description:* Section 104 (42 U.S.C. 15004) of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act of 2000) directs the Secretary of Health and Human Services to develop and implement a system of program accountability to monitor the grantees funded under the DD Act of 2000. The program accountability system shall include the National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDs) authorized under Part D of the DD Act of 2000. In addition to the accountability system, Section 154(e) (42 U.S.C. 15064) of the DD Act of 2000 includes requirements for a UCEDD Annual Report.

*Respondents:* 67.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| UCEDD Annual Report Template | 67 | 1 | 200 | 13,400 |

*Estimated Total Annual Burden Hours:* 13,400.

*Additional Information:* Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

*OMB Comment:* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: August 6, 2008.

**Janean Chambers,**

*Reports Clearance Officer.*

[FR Doc. E8–18629 Filed 8–13–08; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration (SAMHSA) National Advisory Council will meet on September 8 and 9, 2008.

The meeting is open to the public and will include a report from the SAMHSA Acting Administrator and updates on legislative developments and SAMHSA's National Registry of Evidence-Based Practices. The meeting will also include discussions focusing on Creating and Sustaining Recovery-Oriented Systems of Care and Positioning SAMHSA for an Era of Health Care Reform.

Attendance by the public will be limited to space available. Public comments are welcome. Please communicate with the SAMHSA National Advisory Council Designated Federal Official, Ms. Toian Vaughn (see contact information below), to make arrangements to attend, to comment or to request special accommodations for persons with disabilities.

Substantive program information, a summary of the meeting, and a roster of Council members may be obtained as soon as possible after the meeting, either by accessing the SAMHSA Committee Web site, *http://www.nac.samhsa.gov,* or by contacting Ms. Vaughn. The transcript for the meeting will also be available on the SAMHSA Committee Web site within three weeks after the meeting.

*Committee Name:* SAMHSA National Advisory Council.

*Date/Time/Type:* Monday, September 8, 2008, from 9 a.m. to 5 p.m.: Open. Tuesday, September 9, 2008, from 8:30 a.m. to 10:30 a.m.: Open.

*Place:* 1 Choke Cherry Road, Sugarloaf and Seneca Conference Rooms, Rockville, Maryland 20857.

*Contact:* Toian Vaughn, M.S.W., Designated Federal Official, SAMHSA National Advisory Council, and SAMHSA Committee Management Officer, 1 Choke Cherry Road, Room 8–1089, Rockville, Maryland 20857, Telephone: (240) 276–2307; FAX: (240) 276–2220; and e-mail: *toian.vaughn@samhsa.hhs.gov.*

**Toian Vaughn,**

*Committee Management Officer, Substance Abuse and Mental Health Services Administration.*

[FR Doc. E8–18795 Filed 8–13–08; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[CIS No. 2452–08; DHS Docket No. USCIS–2008–0029]**

**RIN 1615–ZA69**

### Extension of the Designation of Sudan for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Sudanese TPS Beneficiaries

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

**ACTION:** Notice.

**SUMMARY:** This Notice announces that the Secretary of Homeland Security has extended the designation of Sudan for temporary protected status (TPS) for 18 months, from its current expiration date of November 2, 2008 through May 2, 2010. This Notice also sets forth procedures necessary for nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) with TPS to re-register with U.S. Citizenship and Immigration Services (USCIS) and to apply for an extension of their employment authorization documents (EADs) for the additional 18-month period. Re-registration is limited to persons who have previously registered for TPS under the designation of Sudan and whose applications have been granted or remain pending. Certain nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security (DHS) recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on November 2, 2008. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Sudan for six months, through May 2, 2009, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. USCIS will issue new EADs with the May 2, 2010 expiration date to eligible TPS beneficiaries who timely re-register and apply for EADs.

**DATES:** The extension of the TPS designation of Sudan is effective November 3, 2008, and will remain in effect through May 2, 2010. The 60-day re-registration period begins August 14, 2008, and will remain in effect until October 14, 2008. To facilitate processing of applications, applicants are strongly encouraged to file as soon as possible after the start of the 60-day re-registration period beginning on August 14, 2008.

**FOR FURTHER INFORMATION CONTACT:** Claudia Young, Status and Family Branch, Office of Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529, telephone (202) 272–1533. This is not a toll-free call. Further information will also be available at local USCIS offices upon publication of this Notice and on the USCIS Web site at *http://www.uscis.gov*. **Note:** The phone number provided here is solely for questions regarding this TPS notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual case can check Case Status Online available at the USCIS Web site listed above, or applicants may call the USCIS National Customer Service

Center at 1–800–375–5283 (TTY 1–800–767–1833).

**SUPPLEMENTARY INFORMATION:**

### Abbreviations and Terms Used in This Document

Act—Immigration and Nationality Act
ASC—USCIS Application Support Center
DHS—Department of Homeland Security
DOS—Department of State
EAD—Employment Authorization Document
IDPs—Internally Displaced Persons
OSC—U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices
SAF—Sudanese Armed Forces
Secretary—Secretary of Homeland Security
SPLM/A—Sudanese People's Liberation Movement/Army
TPS—Temporary Protected Status
USCIS—U.S. Citizenship and Immigration Services

### What authority does the Secretary of Homeland Security have to extend the designation of Sudan for TPS?

Section 244(b)(1) of the Immigration and Nationality Act (Act), 8 U.S.C. 1254a(b)(1), authorizes the Secretary of Homeland Security (Secretary), after consultation with appropriate agencies of the Government, to designate a foreign State (or part thereof) for TPS.[1] The Secretary may then grant TPS to eligible nationals of that foreign State (or aliens having no nationality who last habitually resided in that State). Section 244(a)(1)(A) of the Act; 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of the TPS designation, the Secretary, after consultations with appropriate agencies of the Government, must review the conditions in a foreign State designated for TPS and determine whether the conditions for the TPS designation continue to be met and, if so, must determine the length of an extension of the TPS designation. Section 244(b)(3)(A), (C) of the Act. If the Secretary determines that the foreign State no longer meets the conditions for the TPS designation, he must terminate the designation. Section 244(b)(3)(B) of the Act.

### Why was Sudan initially designated for TPS?

On November 4, 1997, the Attorney General published a Notice in the **Federal Register**, at 62 FR 59737, designating Sudan for TPS based on an ongoing armed conflict and extraordinary and temporary conditions within that country. *See* Section 244(a)(b)(1)(A), (C) of the Act; 8 U.S.C. 1254a(b)(1)(A), (C).

### When was the TPS designation for Sudan extended?

On November 3, 1998, the Attorney General extended the designation determining that the conditions warranting such designation continued to be met. 63 FR 59337.

On November 9, 1999, the Attorney General extended and re-designated Sudan by publishing a Notice in the **Federal Register**, at 64 FR 61128, based upon the ongoing armed conflict and extraordinary and temporary conditions within Sudan which had worsened.

After that date, the Attorney General and then the Secretary of Homeland Security (Secretary) extended the TPS designation of Sudan four times, determining in each instance that the conditions warranting the designation continued to be met. 65 FR 67407 (Nov. 9, 2000); 66 FR 46031 (Aug. 31, 2001); 67 FR 55877 (Aug. 30, 2002); 68 FR 52410 (Sept. 3, 2003).

On October 7, 2004, the Secretary extended and re-designated Sudan for TPS due to the intensification of the ongoing armed conflict in the Darfur region and the extraordinary and temporary conditions resulting from the ongoing conflict. 69 FR 60168.

After October 2004, the Secretary extended the TPS designation of Sudan two times, determining in each instance that the conditions warranting the designation continued to be met. 70 FR 52429 (Sept. 2, 2005); 72 FR 10541 (May 3, 2007). Thus, since the initial designation of Sudan for TPS in 1997, the Attorney General, and later, the Secretary, have extended—or re-designated and extended—TPS for Sudan a total of ten times, including this 2008 extension.

### Why has the Secretary decided to extend the TPS designation for Sudan through May 2, 2010?

Over the past year, DHS and the Department of State (DOS) have continued to review conditions in Sudan. Based on this review, DHS has determined that an 18-month extension is warranted because the armed conflict is ongoing, and the extraordinary and temporary conditions that prompted the October 7, 2004, re-designation persist.

Armed conflict continues in the Darfur region of Western Sudan. Since early 2003, armed conflict has persisted between the government of Sudan and the Sudanese People's Liberation Movement/Army (SPLM/A). Furthermore, violence against civilians has continued, with reports of killings, rapes, beatings, looting and burning of property throughout the region, including at camps for internally displaced people. Deliberate targeting of civilians continues to be a hallmark of violence perpetrated by all parties to the conflict. Since the beginning of this conflict, approximately 2.45 million people have been forced to leave their homes and are internally displaced.

In Darfur and Southern Sudan, conditions remained the same or have worsened over the past year. By June 2008, implementation of the 2005 peace agreement had not advanced and key issues, particularly the status and future of Abyei, the division of oil revenues, border demarcation and deployment of armed forces remained unresolved. There were 280,000 newly displaced Sudanese (including 80,000 displaced in the first two months of 2008), bringing the total number of internally displaced persons (IDPs) to 2,387,000. Large-scale violence by the Sudanese government and its allies directed against civilians was reported, including an attack in February 2008 that killed 115 people and forced 30,000 from their homes. Additionally, a clash between the Sudanese Armed Forces (SAF) and SPLM/A in Abyei in May 2008 has displaced over 100,000 people. Moreover, violence has been increasingly directed against humanitarian workers, of whom 14,000 are presently in Darfur. This violence includes robberies, hijackings of humanitarian aid vehicles, and attacks on humanitarian facilities.

Based upon this review, the Secretary has determined, after consultation with the appropriate Government agencies, that the conditions that prompted the designation of Sudan for TPS continue to be met. *See* section 244(b)(3)(A) of the Act; 8 U.S.C. 1254a(b)(3)(A). An ongoing armed conflict and extraordinary and temporary conditions in Sudan prevent aliens who are nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) from returning in safety. The Secretary also finds that it is not contrary to the national interest of the United States to permit aliens who meet the eligibility requirements of TPS to remain in the United States temporarily. *See* section 244(b)(1)(C) of the Act. On the basis of these findings and determinations, the Secretary concludes that the designation of Sudan for TPS should be extended for an additional 18-month period. *See* section 244(b)(3)(C) of the Act. There are approximately 500 nationals of Sudan

[1] As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA ''shall be deemed to refer to the Secretary'' of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, section 1517).

(or aliens having no nationality who last habitually resided in Sudan) who are eligible for TPS under this extended designation.

**What actions should qualifying aliens take pursuant to this notice?**

To maintain TPS, a national of Sudan (or an alien having no nationality who last habitually resided in Sudan) who was granted TPS and who has not had TPS withdrawn must re-register for TPS during the 60-day re-registration period from August 14, 2008 until October 14, 2008. To re-register, aliens must follow the filing procedures set forth in this Notice. An addendum to this Notice provides instructions on this extension, including filing and eligibility requirements for TPS and EADs. Information concerning the extension of the designation of Sudan for TPS also will be available at local USCIS offices upon publication of this Notice and on the USCIS Web site at *http://www.uscis.gov*.

**Notice of Extension of the TPS Designation of Sudan**

By the authority vested in me as Secretary of Homeland Security under section 244 of the Act, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate Government agencies, that the conditions that prompted re-designation of Sudan for temporary protected status (TPS) on October 7, 2004, continue to be met. *See* section 244(b)(3)(A). Accordingly, I am extending the TPS designation of Sudan for 18 months from November 3, 2008, through May 2, 2010.

Dated: August 6, 2008.

**Michael Chertoff,**

*Secretary.*

**Temporary Protected Status Filing Requirements**

*Do I need to re-register for TPS if I currently have benefits through the designation of Sudan for TPS, and would like to maintain them?*

Yes. If you already have received TPS benefits through the TPS designation of Sudan, your benefits will expire on November 2, 2008. All TPS beneficiaries must comply with the re-registration requirements described in this Notice in order to maintain TPS benefits through May 2, 2010. TPS benefits include temporary protection against removal from the United States and employment authorization during the TPS designation period. Section 244(a)(1) of the Act; 8 U.S.C. 1254a(a)(1). Failure to re-register without good cause will result in the withdrawal of your temporary protected status and possibly your removal from the United States. Section 244(c)(3)(C) of the Act; 8 U.S.C. 1254a(c)(3)(C).

*If I am currently registered for TPS or have a pending application for TPS, how do I re-register to renew my benefits for the duration of the extension period?*

Please submit the proper forms and fees according to Tables 1 and 2 below. The following are some helpful tips to keep in mind when completing your application:

- All applicants are strongly encouraged to pay close and careful attention when filling out the required forms to help ensure that their dates of birth, alien registration numbers, spelling of their names, and other required information is correctly entered on the forms.
- All questions on required forms should be fully and completely answered. Failure to fully complete each required form may result in a delay in processing of your application.
- Aliens who have previously registered for TPS, but whose applications remain pending, should follow the filing instructions in this Notice if they wish to renew their TPS benefits.
- All TPS re-registration applications submitted without the required fees will be returned to applicants.
- All fee waiver requests should be filed in accordance with 8 CFR 244.20.
- If you received an EAD during the most recent registration period, please submit a photocopy of the front and back of your EAD.

TABLE 1—APPLICATION FORMS AND APPLICATION FEES

| If— | And— | Then— |
|---|---|---|
| You are re-registering for TPS | You are applying for an extension of your EAD valid through May 2, 2010. | You must complete and file the Form I–765, Application for Employment Authorization, with the fee of $340 or a fee waiver request. You must also submit Form I–821, Application for Temporary Protected Status, with no fee. |
| You are re-registering for TPS | You are Not applying for renewal of your EAD | You must complete and file the Form I–765 with no fee and Form I–821 with no fee. NOTE: Do Not check any box for the question "I am applying for" listed on Form I–765, as you are Not requesting an EAD benefit. |
| You are applying for TPS as a late initial registrant (see below) and you are between the ages of 14 and 65 (inclusive). | You are applying for a TPS-related EAD | You must complete and file Form I–821 with the $50 fee or fee waiver request and Form I–765 with the fee of $340 or a fee waiver request. |
| You are applying for TPS as a late initial registrant and are under age 14 or over age 65. | You are applying for a TPS-related EAD | You must complete and file Form I–821 with the $50 fee or fee waiver request. You must also submit Form I–765 with no fee. |
| You are applying for TPS as a late initial registrant, regardless of age. | You are Not applying for an EAD | You must complete and file Form I–821 with the $50 fee or fee waiver request and Form I–765 with no fee. |
| Your previous TPS application is still pending | You are applying to renew your temporary treatment benefits (*i.e.*, an EAD with category "C–19" on its face). | You must complete and file the Form I–765 with the fee of $340 or a fee waiver request. You must also submit Form I–821, with no fee. |

Certain applicants must also submit a Biometric Service Fee (See Table 2).

TABLE 2—BIOMETRIC SERVICE FEE

| If | And | Then |
|---|---|---|
| You are 14 years of age or older | 1. You are re-registering for TPS, or<br>2. You are applying for TPS under the late initial registration provisions, or.<br>3. Your TPS application is still pending and you are applying to renew temporary treatment benefits (*i.e.,* EAD with category "C–19" on its face). | You must submit a Biometric Service fee of $80 or a fee waiver request. |
| You are younger than 14 years of age | 1. You are applying for an EAD, or<br>2. You are Not applying for an EAD | You do Not need to submit a Biometric Service fee. |

*What edition of the forms should I submit?*

Only versions of Form I–821 dated October 17, 2007, or later will be accepted. Only versions of Form I–765 dated May 27, 2008, or later will be accepted. The revision date can be found in the bottom right corner of the form. The proper forms can be found on the Internet at *http://www.uscis.gov* or by calling the USCIS forms hotline at 1–800–870–3676.

*Where should I submit my application for TPS?*

Please mail your application for TPS to the following address: U.S. Citizenship and Immigration Services, Attn: TPS Sudan, P.O. Box 8677, Chicago, IL 60680–8677.

Or, for courier deliveries, please mail your application to: U.S. Citizenship and Immigration Services, Attn: TPS Sudan, 131 S. Dearborn—3rd Floor, Chicago, IL 60603–5517.

*Can I file my application electronically?*

If you are filing for re-registration and do not need to submit supporting documentation (see Table 3) with your application, you may file your application electronically. To file your application electronically, follow directions on the USCIS Web site at: *http://www.uscis.gov.*

*How will I know if I need to submit supporting documentation with my application package?*

See Table 3 below to determine if you need to submit supporting documentation.

TABLE 3—WHO SHOULD SUBMIT SUPPORTING DOCUMENTATION?

| If | Then |
|---|---|
| One or more of the questions listed in Part 4, Question 2 of Form I–821 applies to you. | You must submit an explanation, on a separate sheet(s) of paper, and/or additional documentation must be provided. |
| You were granted TPS by an Immigration Judge or the Board of Immigration Appeals. | You must include evidence of the grant of TPS (such as an order from the Immigration Judge) with your application package. |

*How do I know if I am eligible for late registration?*

You may be eligible for late initial registration under 8 CFR 244.2. In order to be eligible for late initial registration, you must:

(1) Be a national of Sudan (or an alien who has no nationality and who last habitually resided in Sudan);

(2) Have continuously resided in the United States since October 7, 2004;

(3) Have been continuously physically present in the United States since October 7, 2004; and

(4) Be both admissible as an immigrant, except as provided under section 244(c)(2)(A) of the Immigration and Nationality Act (Act), and not ineligible under section 244(c)(2)(B) of the Act.

Additionally, you must be able to demonstrate that during the registration period for the most recent re-designation (from October 7, 2004 to April 5, 2005), you:

(1) Were a nonimmigrant or had been granted voluntary departure status or any relief from removal;

(2) Had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal or change of status pending or subject to further review or appeal;

(3) Were a parolee or had a pending request for re-parole; or

(4) Are the spouse or child of an alien currently eligible to be a TPS registrant.

An applicant for late initial registration must file an application for late registration no later than 60 days after the expiration or termination of the applicable condition described above. 8 CFR 244.2(g). All late initial registration applications for TPS, pursuant to the designation of Sudan, should be submitted to the appropriate address listed above in Chicago, Illinois.

*Are certain aliens ineligible for TPS?*

Yes. There are certain criminal and terrorism-related inadmissibility grounds that render an alien ineligible for TPS. *See* section 244(c)(2)(A)(iii); 8 U.S.C. 1254a(c)(2)(A)(iii). Further, aliens who have been convicted of any felony or two or more misdemeanors committed in the United States are ineligible for TPS under section 244(c)(2)(B)(i) of the Act, as are aliens described in the bars to asylum in section 208(b)(2)(A) of the Act, 8 U.S.C. 1158(b)(2)(A). *See* section 244(c)(2)(B)(ii) of the Act; 8 U.S.C. 1254a(c)(2)(B)(ii).

*If I currently have TPS, can I lose my TPS benefits?*

TPS and related benefits will be withdrawn if you:

(1) Are not eligible for TPS;

(2) Fail to timely re-register for TPS without good cause; or

(3) Fail to maintain continuous physical presence in the United States. *See* sections 244(c)(3)(A)–(C) of the Act; 8 U.S.C. 1254a(c)(3)(A)–(C).

*Does TPS lead to lawful permanent residence status?*

No. TPS is a temporary benefit that does not lead to lawful permanent residence status or confer any other immigration status. Sections 244(f)(1) and (h) of the Act; 8 U.S.C. 1254a(f)(1), and (h).

*If I am currently covered under TPS, what status will I have if my country's TPS designation is terminated?*

When a country's TPS designation is terminated, TPS beneficiaries will maintain the same immigration status, if any, that they held prior to obtaining TPS (unless that status has since expired or been terminated), or any other status they may have acquired while registered for TPS. Accordingly, if you held no lawful immigration status prior to being granted TPS and did not obtain any other status during the TPS period, you will revert to unlawful status upon the termination of the TPS designation. Once the Secretary determines that a TPS designation should be terminated, aliens who had TPS under that designation, and who do not hold any other lawful immigration status, must plan for their departure from the United States.

*May I apply for another immigration benefit while registered for TPS?*

Yes. Registration for TPS does not prevent you from applying for non-immigrant status, filing for adjustment of status based on an immigrant petition, or applying for any other immigration benefit or protection. Section 244(a)(5) of the Act; 8 U.S.C. 1254a(a)(5). For the purposes of change of status, and adjustment of status, an alien is considered to be in, and maintaining, lawful status as a nonimmigrant during the period in which the alien is granted TPS. *See* section 244(f)(4) of the Act; 8 U.S.C. 1254a(f)(4). However, if an alien has periods of time when he or she had no lawful immigration status before, or after, the alien's time in TPS, those period(s) of unlawful presence may negatively affect that alien's ability to adjust to permanent resident status or attain other immigration benefits, depending on the circumstances of the specific case. *See, e.g.* , section 212(a)(9) of the Act; 8 U.S.C. 1182(a)(9) (unlawful presence ground of inadmissibility that is triggered by a departure from the United States). In some cases, the unlawful presence ground of inadmissibility, and certain other grounds of inadmissibility, may be waived when an alien applies to adjust to permanent resident status or for another immigration status.

*How does an application for TPS affect my application for asylum or other immigration benefits?*

An application for TPS does not affect an application for asylum or any other immigration benefit. Denial of an application for asylum or any other immigration benefit does not affect an applicant's TPS eligibility, although the grounds for denying one form of relief may also be grounds for denying TPS. For example, a person who has been convicted of a particularly serious crime is not eligible for asylum or TPS. *See* sections 244(b)(2)(A)(ii) and 244(c)(2)(B)(ii) of the Act; 8 U.S.C. 1158(b)(2)(A)(ii) and 8 U.S.C. 1254a(c)(2)(B)(ii).

*Can a national of Sudan (or aliens having no nationality who last habitually resided in Sudan) who entered the United States after October 7, 2004 file for TPS?*

No. This extension does not expand TPS eligibility to those that are not currently eligible. To be eligible for benefits under this extension, nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) must have continuously resided and have been continuously physically present in the United States since October 7, 2004, the date of the most recent re-designation of Sudan for TPS.

**Employment Authorization Document Automatic Extension Guidelines**

*Who is eligible to receive an automatic six-month EAD extension from November 3, 2008, to May 2, 2009?*

To receive an automatic six-month extension of an EAD, an individual must be a national of Sudan (or an alien having no nationality who last habitually resided in Sudan) who has applied for and received an EAD under the designation of Sudan for TPS and who has not had TPS withdrawn or denied. This automatic extension is limited to EADs issued on Form I–766, Employment Authorization Document, bearing an expiration date of November 2, 2008. These EADs must also bear the notation ''A–12'' or ''C–19'' on the face of the card under ''Category.''

*What documents should I bring to my ASC appointment?*

TPS re-registrants will receive a notice in the mail with instructions as to whether or not they will be required to appear at a USCIS Application Support Center (ASC) for biometrics collection. To increase efficiency and improve customer service, whenever possible USCIS will use an individual's previously-captured biometrics and will conduct necessary security checks using those biometrics, such that you may not be required to appear at an ASC. Due to systems limitations, it may not be possible in every case to reuse biometrics.

However, even if you do not need to attend an ASC appointment, you are required to pay the separate biometrics fee. This fee will help cover the USCIS costs associated with use and maintenance of collected biometrics (such as fingerprints) for FBI and other background checks, identity verification and document production.

If you are required to report to an ASC, you must bring the following documents:

(1) Your receipt notice for your re-registration application;

(2) Your ASC appointment notice; and

(3) Your current EAD.

If no further action is required for your case, you will receive a new EAD by mail valid through May 2, 2010. If your case requires further resolution, USCIS will contact you in writing to explain what additional information, if any, is necessary to resolve your case. If your application is subsequently approved, you will receive a new EAD in the mail with an expiration date of May 2, 2010.

*What if my address changes after I file my re-registration application?*

If your address changes after you file your application for re-registration, you must complete and submit Form AR–11 by mail or electronically. The mailing address is:

USCIS, Change of Address, PO Box 7134, London, KY 40742–7134.

Form AR–11 can also be filed electronically by following the directions on the USCIS Web site at: *http://www.uscis.gov.* To facilitate the processing of your address change on your TPS application, you may call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833) to request that your address be updated on your application. Please note that calling the USCIS National Customer Service Center does *not* relieve you of your burden to properly file a Form AR–11 with USCIS.

*May I request an interim EAD at my local District Office?*

No. USCIS will not issue interim EADs to TPS applicants and re-registrants at District Offices. Interim

EADs may only be issued at the Vermont Service Center.

*How may employers determine whether an EAD has been automatically extended for six-months through May 2, 2009, and therefore acceptable for completion of the Form I–9, Employment Eligibility Verification?*

An EAD that has been automatically extended by this Notice through May 2, 2009, will bear the notation ''A–12'' or ''C–19'' on the face of the Form I–766 under ''Category,'' and will have an expiration date of November 2, 2008, printed on the face of the card. New EADs or extension stickers showing the May 2, 2009, expiration date of the six-month automatic extension will not be issued. Employers should not request proof of Sudanese citizenship.

Employers should accept an EAD as a valid ''List A'' document and not ask for additional Form I–9 documentation if presented with an EAD that has been extended pursuant to this **Federal Register** Notice, so long as the EAD reasonably appears on its face to be genuine and to relate to the employee. This extension does not affect the right of an applicant for employment or an employee to present any legally acceptable document as proof of identity and eligibility for employment.

*Note to Employers*

Employers are reminded that the laws requiring employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This Notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those setting forth re-verification requirements. For questions, employers may call the USCIS Customer Assistance Office at 1–800–357–2099. Also, employers may call the U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) Employer Hotline at 1–800–255–8155. Employees or applicants may call the OSC Employee Hotline at 1–800–255–7688 for information regarding the automatic extension. Additional information is available on the OSC Web site at *http://www.usdoj.gov/crt/osc/index.html.*

*How may employers determine an employee's eligibility for employment once the automatic six-month extension expires on May 2, 2009?*

Eligible TPS aliens will possess an EAD on Form I–766 with an expiration date of May 2, 2010. The EAD will bear the notation ''A–12'' or ''C–19'' on the face of the card under ''Category,'' and should be accepted for the purposes of verifying identity and employment authorization.

*What documents may a qualified individual show to his or her employer as proof of employment authorization and identity when completing Form I–9?*

During the first six months of this extension, qualified individuals who have received a six-month automatic extension of their EADs by virtue of this **Federal Register** Notice may present their TPS-based EAD to their employer, as described above, as proof of identity and employment authorization through May 2, 2009. To minimize confusion over this extension at the time of hire or re-verification, qualified individuals may also present a copy of this **Federal Register** Notice regarding the automatic extension of employment authorization documentation through May 2, 2009. After May 2, 2009, a qualified individual may present a new EAD valid through May 2, 2010.

In the alternative, any legally acceptable document or combination of documents as listed on the Form I–9 may be presented as proof of identity and employment eligibility.

[FR Doc. E8–18826 Filed 8–13–08; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOMELAND SECURITY

### United States Immigration and Customs Enforcement

### Agency Information Collection Activities: Extension of a Currently Approved Information Collection

**ACTION:** Correction to Notice of Information Collection Under Review; Form I–246, Application for Stay of Deportation or Removal, OMB No. 1653–0021.

**SUMMARY:** The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 26, 2008, Vol. 73, No. 59 16035, and on June 2, 2008, Vol. 73, No. 106 31499. This document contains corrections to certain portions of those notices that were published erroneously.

**Correction**

- In the Overview of This Information Collection section, Item 1 is corrected as follows: *Type of Information Collection:* Extension of currently approved information collection.
- In the Overview of This Information Collection section, Item 5 is corrected as follows: *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 10,000 responses at 30 minutes (0.5 hours) per response.
- In the Overview of This Information Collection section, Item 6 is corrected as follows: *An estimate of the total public burden (in hours) associated with the collection:* 5,000 annual burden hours.

Dated: August 11, 2008.

**Lee Shirkey,**

*Chief, Records Management Branch Chief, United States Immigration and Customs Enforcement, Department of Homeland Security.*

[FR Doc. E8–18816 Filed 8–13–08; 8:45 am]

**BILLING CODE 9111–28–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CA–110]**

### Meeting of the Central California Resource Advisory Council Off-Highway Vehicle Subcommittee

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Central California Resource Advisory Council Off-Highway Vehicle (OHV) Subcommittee will meet as indicated below.

**DATES:** The meeting will be held Saturday, September 13, 2008, at the Keck Community Center, 555 Monroe St., Coalinga, California, from 10 a.m. to noon. Members of the public are welcome to attend the meeting. The subcommittee will conduct organizational business and discuss OHV issues for the subcommittee to address.

**FOR FURTHER INFORMATION CONTACT:** BLM Folsom Field Office Manager Bill Haigh or BLM Central California Public Affairs Officer David Christy, both at (916) 985–4474.

**SUPPLEMENTARY INFORMATION:** The twelve-member Central California RAC advises the Secretary of the Interior,

through the BLM, on a variety of public land issues associated with public land management in the Central California. The RAC approved formation of an OHV Subcommittee in April 2007. The meeting is open to the public. Individuals who plan to attend and need special assistance such as sign language interpretation or other reasonable accommodations should contact the BLM as indicated above.

Dated: August 7, 2008.

**David Christy,**

*Public Affairs Officer.*

[FR Doc. E8–18821 Filed 8–13–08; 8:45 am]

**BILLING CODE 4310–40–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before August 2, 2008. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by August 29, 2008.

**J. Paul Loether,**

*Chief, National Register of Historic Places/ National Historic Landmarks Program.*

**ALASKA**

**Anchorage Borough-Census Area**

McKinley Tower Apartments, 337 E. 4th Ave., Anchorage, 08000882

**CALIFORNIA**

**Monterey County**

Monterey County Court House, 240 Church St., Salinas, 08000878

**COLORADO**

**Custer County**

Wetmore Post Office, 682 Co. Rd. 395, Wetmore, 08000860

**Jefferson County**

North Fork Historic District (Boundary Increase), Longview, Foxton, Argyle and Pine Grove Expansions, Pine and South Platte, 08000861

**CONNECTICUT**

**Hartford County**

Ambassador Apartments, 206–210 Farmington Ave., Hartford, 08000859

**IDAHO**

**Blaine County**

Hailey Masonic Lodge, 100 S. 2nd Ave., Hailey, 08000869

**Bonneville County**

Art Troutner Houses Historic District, 3950, 4012 and 4032 S. 5th W., Idaho Falls, 08000868

**MASSACHUSETTS**

**Berkshire County**

Mahaiwe Block, 6–14 Castle St. and 314–322 Main St., Great Barrington, 08000898

**Essex County**

JOFFRE, (shipwreck), (Eastern Rig Dragger Fishing Vessel Shipwrecks in the Stellwagen Bank National Marine Sanctuary) Address Restricted, Massachusetts, 08000887

**Hampden County**

North High Street Historic District (Boundary Increase), 580 Dwight St., 230, 234 and 236 Maple St., Holyoke, 08000897

**MISSOURI**

**Franklin County**

Keller, Christian and Anna, Farmstead, 936 Kohl Country La., Gerald, 08000867

**MONTANA**

**Beaverhead County**

Elkhorn-Coolidge Historic District, Forest Service Rd. #2465, approximately four miles SE. of jct. with MT 43, Wise River, 08000884

**NEW JERSEY**

**Middlesex County**

Princeton Nurseries Historic District, Generally along Mapleton Rd. and Ridge Rd., Plainsboro and South Brunswick, 08000899

**NEW YORK**

**Erie County**

General Electric Tower, 535 Washington St., Buffalo, 08000865

USS CROAKER (submarine), 1 Naval Park Cove, Buffalo, 08000863

**Schoharie County**

St. John's Lutheran Church, 6569 NY 10, Beekman Corners, 08000864

**Suffolk County**

Big Duck Ranch, 1012 NY 24, Flanders, 08000866

**Washington County**

Wing-Northup House, 167 Broadway, Fort Edward, 08000862

**NORTH CAROLINA**

**Haywood County**

Shook-Welch-Smathers House, 178 Morgan St., Clyde, 08000891

**Transylvania County**

Grogan, William H., House, (Transylvania County MPS) 24 Warren La., Brevard, 08000890

**Wake County**

City Cemetery, 17 S. E. St., Raleigh, 08000889

Free Church of the Good Shepherd, 110 S. E. St., Raleigh, 08000888

**SOUTH DAKOTA**

**Harding County**

Fowler Hotel, 103 1st St., Buffalo, 08000886

**Lawrence County**

Harvey, Jerome and Jonetta Homestead Cabin, Township 3, Range 2, Track A of Homestead Entry Survey 71, Lead, 08000885

**TEXAS**

**Tyler County**

Warren School, 312 Co. Rd. 1515, Warren, 08000883

**UTAH**

**Carbon County**

Bryner, Albert and Mariah, House, 68 S. 100 E., Price, 08000858

**Salt Lake County**

Keyser, Malcolm and Elizabeth, House, 381 E. 11th Ave., Salt Lake City, 08000881

Peter Pan Apartments, (Salt Lake City MPS) 446 E. 300 S., Salt Lake City, 08000880

Piccardy Apartments, (Salt Lake City MPS) 115 S. 300 E., Salt Lake City, 08000879

**VIRGINIA**

**Accomack County**

Hills Farm, 19065 Hills Farm Rd., Greenbush, 08000872

**Albemarle County**

Clark Hall, University of Virginia, 291 McCormick Rd., Charlottesville, 08000871

**Buchanan County**

Whitewood High School, 17424 Dismal River Rd., Whitewood, 08000893

**Chesterfield County**

Proctor Creek, Jefferson Davis Highway Marker, (UDC Commemorative Highway Markers along the Jefferson Davis Highway in Virginia) 9300 Block of Jefferson Davis Hwy., Richmond, 08000892

**Cumberland County**

High Bridge, Appomattox River, Farmville, 08000875

**Dinwiddie County**

Petersburg Old Town Historic District (Boundary Increase), 241 4th St., 223–225 Henry St., 230 and 316 E. Bank St., Petersburg, 08000873

**Mecklenburg County**

La Crosse Hotel, 201 Central Ave., La Crosse, 08000876

**Petersburg Independent city**

Commerce Street Industrial Historic District, Commerce, Upper Appomattox, West, Dunlop, and South Sts., Petersburg, 08000870

**Prince Edward County**

High Bridge, Appomattox River, Farmville, 08000875

**Richmond Independent city**

Hunt-Sitterding House, 901 Floyd Ave., Richmond, 08000877

**Stafford County**

Union Church and Cemetery, Carter St. and Butler Rd., Falmouth, 08000896

**Winchester Independent city**

Winchester Coca-Cola Bottling Works, 1720 Valley Ave., Winchester, 08000895

Winchester Historic District (Boundary Increase), 300–400 blocks of N. Cameron St., 12 Clark St., 110 E. Fairfax La. and 145 N. Baker St., Winchester, 08000874

**Wythe County**

St. John's Episcopal Church, 275 E. Main St., Wytheville, 08000894

Request for REMOVAL has been made for the following resources:

**IOWA**

**Black Hawk County**

Forrest Milling Company Oatmeal Mill, N. Main St., Freeport vicinity, 800001430

**Mahaska County**

Bridge near New Sharon, Co. Rd. 629 over drainage ditch, New Sharon, 98000505

**Scott County**

Burtis-Kinball House Hotel, 210 E. 4th St., Davenport, 79003696

**Van Buren County**

Keosauqua Bridge, IA 1 over Des Moines River, Keosauqua, 98999476

**Winneshiek County**

Decorah East Side Elementary and Middle School, 210 Vernon St., Decorah, 98991204

Freeport Bowstring Arch Bridge, Spans Upper Iowa River, Freeport vicinity, 84001407

[FR Doc. E8–18862 Filed 8–13–08; 8:45 am]

**BILLING CODE 4312–51–P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Appointment of Individuals To Serve as Members of Performance Review Board

**AGENCY:** United States International Trade Commission.

**ACTION:** Appointment of Individuals To Serve as Members of Performance Review Board.

**DATES:** *Effective:* July 4, 2008.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Roscoe, Director of Human Resources, U.S. International Trade Commission, (202) 205–2651.

**SUPPLEMENTARY INFORMATION:** The Chairman of the U.S. International Trade Commission has appointed the following individuals to serve on the Commission's Performance Review Board (PRB):

Chair of the PRB: Vice-Chairman Daniel R. Pearson.

Vice-Chair of the PRB: Dean A. Pinkert.

Member: David Beck.
Member: Robert G. Carpenter.
Member: Robert B. Koopman.
Member: Karen Laney-Cummings.
Member: Lynn I. Levine.
Member: James M. Lyons.
Member: Stephen A. McLaughlin.
Member: Robert A. Rogowsky.
Member: Lyn M. Schlitt.

This notice is published in the **Federal Register** pursuant to the requirement of 5 U.S.C. 4314(c)(4). This notice replaces the notice published at 73 FR 46334 (August 8, 2008); that notice is withdrawn. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 205–1810.

Issued: August 8, 2008.

By order of the Chairman.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E8–18768 Filed 8–13–08; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. National Association of Realtors; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Illinois in *United States of America* v. *National Association of Realtors®*, No. 05–C–5140. On September 8, 2005, the United States filed a Complaint alleging that the National Association of Realtors® (''NAR'') violated Section 1 of the Sherman Act, 15 U.S.C. 1, by adopting policies that suppress competition from real estate brokers who use password-protected ''virtual office websites'' or ''VOWs'' to deliver high-quality brokerage services to their customers. The proposed Final Judgment, filed on May 27, 2008, requires NAR to repeal the challenged policies arid to adopt new rules that do not discriminate against brokers who use VOWs.

Copies of the Amended Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 5th Street, NW., Room 1010, Washington, DC 20530 (telephone: 202 514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr*, and at the Office of the Clerk of the United States District Court for the Northern District of Illinois. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be addressed to John R. Read, Chief, Litigation III Section, Antitrust Division, U.S. Department of Justice, 450 5th Street, NW., Suite 4000, Washington, DC 20530, (202) 307–0468. Please note that this notice supercedes 73 FR 36104, the June 25, 2008, publication of the proposed Final Judgment and Competitive Impact Statement in *United States of America* v. *National Association of Realtors®*. That publication contained a typesetting error in the ''Statement of MLS Policy'' that is Exhibit B to the proposed Final Judgment (73 FR at 36112). A corrected version of Exhibit B to the proposed Final Judgment is included with this notice.

**J. Robert Kramer II,**

*Director of Operations, Antitrust Division.*

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

United States of America, Department of Justice, Antitrust Division, 325 7th Street, NW., Suite 300, Washington, DC 20530, Plaintiff, v. National Association of Realtors, 430 North Michigan Ave., Chicago, IL 60611, Defendant.

Civil Action No. 05C–5140, Judge Filip, Magistrate Judge Denlow.

Filed: October 4, 2005

**Amended Complaint**

The United States of America, by its attorneys acting under the direction of the Attorney General, brings this civil action pursuant to Section 4 of the

Sherman Act, as amended, 15 U.S.C. 4, to obtain equitable and other relief to prevent and restrain violations of Section 1 of the Sherman Act, as amended, 15 U.S.C. 1.

The United States alleges:

1. The United States brings this action to enjoin the defendant—a national association of real estate brokers—from maintaining or enforcing policies that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anticompetitive rules.

2. The brokers against whom the policies discriminate operate secure, password-protected Internet sites that enable the brokers' customers to search for and receive real estate listings over the Internet. These websites thus replace or augment the traditional practice by which the broker conducts a search of properties for sale and then provides information to the customer by hand, mail, fax, or e-mail. Since these websites were first developed in the late 1990s, brokers' use of the Internet in connection with their delivery of brokerage services has become an important competitive alternative to traditional ''brick-and-mortar'' business models.

3. Defendant's members include traditional brokers who are concerned about competition from Internet-savvy brokers. Before defendant adopted its policies, several of its members voiced opposition to brokers' delivery of listings to customers through their websites—sites that defendant referred to as ''virtual office websites,'' or ''VOWs.'' The head of the working group created by defendant to develop regulations for VOWs argued that defendant should act quickly in adopting regulations for the use of these websites because brokers operating VOWs were ''scooping up market share just below the radar.'' The chairman of the board of RE/MAX, the nation's second-largest real estate franchisor, publicly expressed his concern that these Internet sites would inevitably place downward pressure on brokers' commission rates. One broker complained that because of the lower cost structure of brokers who provide listings to their customers over the Internet, they are able to kick-back 1% of the sales price to the buyer.'' And Cendant, the nation's largest real estate franchisor and owner of the nation's largest real estate brokerage, asserted in a widely circulated white paper that it was ''not feasible'' for even the largest traditional brokers to compete with large Internet companies that operated or affiliated with brokers operating VOWs.

4. In response to such concerns, defendant, through its members, adopted a policy (the ''Initial VOW Policy'') limiting this new competition. The Initial VOW Policy has been implemented in many markets. After plaintiff informed NAR of its intention to bring this action, NAR announced that it had modified this policy (the ''Modified VOW Policy''). Plaintiff challenges both policies in this action as part of a single, ongoing contract, combination, or conspiracy.

5. These policies significantly alter the rules governing multiple listing services (''MLSs'') MLSs collect detailed information about nearly all properties for sale through brokers and are indispensable tools for brokers serving buyers and sellers in each MLS's market area. Defendant's local Realtor associations (''member boards'') control a majority of the MLSs in the United States.

6. Defendant's VOW Policies permit brokers to withhold their clients' listings from VOW operators by means of an ''opt-out'' right. In essence, the policies allow traditional brokers to block the customers of web-based competitors from using the Internet to review the same set of MLS listings that the traditional brokers provide to their customers.

7. The working group that formulated defendant's Initial VOW Policy understood that the opt-out right was fundamentally anticompetitive and harmful to consumers. Two members of the working group wrote that the opt-out right would be ''abused beyond belief'' as traditional brokers selectively withhold listings from particular VOW-based competitors. The chairman of the working group admitted that the opt-out right was likely to be exercised by brokers notwithstanding the fact that ''it may not be in the seller[']s best interest to opt out.'' But he took comfort in the fact that the rule did not require brokers to disclose to clients that their listings would be withheld from some prospective purchasers as a result of the brokers' opt-out decision, thus providing brokers ''flexibility without conversation.''

8. Defendant's VOW Policies restrict the manner in which brokers with efficient, Internet-based business models may provide listings to their customers, and impose additional restrictions on brokers operating VOWs that do not apply to their traditional competitors. Defendant thus denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, and it suppresses technological innovation, discourages competition on price and quality, and raises barriers to entry. Defendant—an association of competitors—has agreed to policies that suppress new competition and harm consumers.

*Jurisdiction and Venue*

9. This Complaint is filed under Section 4 of the Sherman Act, as amended, 15 U.S.C. 4, to prevent and restrain violations by defendant of Section 1 of the Sherman Act, 15 U.S.C. 1. This Court has subject matter jurisdiction over this action under 28 U.S.C. 1331, 1337(a), and 1345.

10. Venue is proper in this district under 28 U.S.C. 139 1(b) because defendant maintains its principal place of business in Chicago, Illinois, and is found here.

*Defendant*

11. Defendant National Association of Realtors (''NAR'') is a trade association organized under the laws of Illinois with its principal place of business in Chicago, Illinois. NAR establishes and enforces policies and professional standards for its over one million individual member brokers and their affiliated agents and sales associates (''Realtors''), and 1,600 local and state member boards. NAR's member brokers compete with one another in local brokerage services markets to represent consumers in connection with real estate transactions.

*Concerted Action*

12. Various others, not named as defendants, have contracted, combined, or conspired with NAR in the violations alleged in this Complaint and have performed acts and made statements in furtherance thereof.

*Trade and Commerce*

13. NAR's policies govern the conduct of its members in all fifty states, including all Realtors and all of NAR's member boards. NAR's member boards control approximately eighty percent of the approximately 1,000 MLSs in the United States.

14. NAR's activities, and the violations alleged in this Complaint, affect home buyers and sellers located throughout the United States.

15. NAR, through its members, is engaged in interstate commerce and is engaged in activity affecting interstate commerce.

*Relevant Markets*

16. The provision of real estate brokerage services to sellers of residential real property and the

provision of real estate brokerage services to buyers of residential real property are relevant service markets.

17. The real estate brokerage business is local in nature. Most sellers prefer to work with a broker who is familiar with local market conditions and who maintains an office or affiliated sales associates within a reasonable distance of the seller's property. Likewise, most buyers seek to purchase property in a particular city, community, or neighborhood, and typically prefer to work with a broker who has knowledge of the area in which they have an interest. The geographic coverage of the MLS serving each town, city, or metropolitan area normally establishes the outermost boundaries of each relevant geographic market, although meaningful competition among brokers may occur in narrower local areas.

*Background of the Offense*

18. At any one time there are over 1.5 million homes for sale in the United States. Most home sellers and buyers engage residential real estate brokers to facilitate transactions.

19. The predominant form of payment for brokerage services is a ''commission,'' a percentage of the price paid for the property. In a typical transaction, the seller agrees to pay a commission to the broker who has contracted with the seller to market the home (the ''listing broker''). If the listing broker finds the buyer, the listing broker keeps the full commission. Frequently, however, a second broker (the ''cooperating broker'') finds the buyer, and the two brokers share the commission.

20. After a listing broker has established an agency relationship with a seller, the broker typically submits detailed information regarding the seller's property to a local NAR-affiliated MLS. Along with the information about the property it submits to the MLS, the listing broker also typically includes an offer to split the commission with any cooperating broker.

Multiple Listing Services

21. MLSs are joint ventures among competing brokers to share their clients' listings and to cooperate in other ways. MLSs list virtually all homes for sale through a broker in the areas they serve. In a substantial majority of markets, a single MLS provides the only available comprehensive compilation of listings. The MLS allows brokers representing sellers to effectively market the sellers' properties to all other broker participants in the MLS and their buyer customers. Conversely, the MLS allows brokers to provide their buyer customers information about all listed properties in which the customers might have an interest.

22. NAR promulgates rules governing the conduct of MLSs and requires its member boards to adopt these rules.

23. The vast majority of brokers believe that they must participate in the MLS operating in their local market in order to adequately serve their customers and compete with other brokers. As a result, few brokers would withdraw from MLS participation even if the fees or other costs associated with that participation substantially increased.

24. By virtue of industry-wide participation and control over a critically important input, the MLS (a joint venture of competing brokers) has market power in almost every relevant market.

25. The methods of making MLS information available to customers have changed as technology has evolved. From the 1920s, when MLSs first became prevalent, brokers allowed customers to view a printed ''MLS book.'' Later, the availability of copy machines allowed brokers to reproduce pages from the MLS book and deliver the pages with responsive listings to customers by hand or mail. The advent of facsimile transmission—and, later, electronic mail—further quickened the process of delivering MLS listings to customers.

Virtual Office Websites

26. With the development of the Internet as an information source for consumers, potential home buyers began to seek Internet sources of information about homes for sale. Beginning in the late 1990s, a number of NAR member brokers began creating password-protected Web sites that enabled potential home buyers, once they had registered as customers of the broker and agreed to certain restrictions on their use of the data, to search the MLS database themselves and to obtain responsive MLS listings over the Internet. These websites came to be known as virtual office websites or VOWs. NAR recognizes the Internet delivery of MLS listings to customers to be an authorized method of providing brokerage services.

27. Brokers can use the Internet to operate more efficiently than they can by using only traditional methods. By transferring search functions from the broker to customers who prefer such control over the process, VOW-operating brokers allow customers to educate themselves at their own pace about the market in which they are considering a purchase. By doing so, brokers with successful password-protected Web sites are able to reduce or eliminate the time and expense involved in identifying and providing relevant listings and otherwise educating their customers. These brokers also spend less time on home tours with their buyer customers, as these buyers frequently tour fewer homes before making a purchase decision than typical buyers. With lower cost structures, brokers with Internet-intensive business models have offered discounted commissions to sellers or commission rebates to buyers.

28. Other sources of listing information on the Internet are inferior to the password-protected VOWs because they do not and cannot guarantee access to all information available in the MLS.

29. Brokers can also use the Internet to support a ''referral'' business model. Referral services provide brokers information about potential buyers in return for a share of any commission the broker receives if the ''lead'' results in a completed transaction. Brokers are not obliged to purchase leads from referral services and do so only when they choose to. Some traditional brokers refer customers to other brokers for a fee, and some VOW operators, similarly, have referred (or have considered referring) some of their customers to other brokers for a fee. Many brokers dislike the concept of paying for leads, and the prospect that Internet-savvy brokers could support referral business models has been a source of industry antipathy to VOWs.

*Nature of the Offense*

30. Brokers with innovative, Internet-based business models present a competitive challenge to brokers who provide listings to their customers only by traditional methods. Many brick-and-mortar brokers fear the ability of VOW operators to use Internet technology to attract more customers and provide better service at a lower cost.

31. In response to concerns raised by certain NAR members about this new form of competition, NAR's Board of Directors voted on May 17, 2003, to adopt the ''Initial VOW Policy,'' a ''Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ('Virtual Office Websites').'' Prior to the filing of the Complaint in this action, NAR had mandated that all 1,600 of its member boards implement the Initial VOW Policy by January 1, 2006. Approximately 200 member boards implemented the Initial VOW Policy

and received NAR's approval of their implementing rules.

32. Section I.3 of the Initial VOW Policy contains an opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any VOW (a ''blanket opt-out'), or on a particular competing broker's VOW (a ''selective opt-out'').

33. In contrast, prior to NAR's adoption of the Initial VOW Policy, a broker could provide any relevant listing in the MLS database to any customer—by whatever method the customer or broker preferred, including via the Internet. Nearly all of NAR's member boards had also adopted rules requiring all participants in their affiliated MLSs to submit, with minor exceptions, all of their clients' listings to the MLS. More importantly, NAR did not permit any broker to withhold his or her clients' listings from a rival.

34. In several of the markets in which NAR's member boards have implemented the Initial VOW Policy, brokers have already exercised their opt-out rights to withhold their clients' listings from the customers of brokers operating VOWs, as well as from brokers who will use password-protected websites to provide listings to their customers in the future. In at least one such instance, an innovative broker discontinued operation of his website because all of his competitor brokers had opted out, making him unable to effectively serve his customers through operation of his site.

35. Section II.4.g of the Initial VOW Policy contains an ''anti-referral'' provision that, with minor exceptions, forbids VOW operators from referring their customers to ''any other entity'' for a fee. In contrast, no NAR rule limits referrals for a fee by brokers who do not convey MLS listings to customers over the Internet.

36. The Initial VOW Policy includes other provisions that impose greater restrictions and limitations on brokers with Internet-based business models than on traditional brokers. For example, under section IV.1.b of the Initial VOW Policy, NAR's member boards may forbid VOW operators from displaying advertising on any website on which MLS listings information is displayed. In contrast, no NAR rule limits the ability of traditional brokers to include advertisements in packages of printed listings they provide to their customers.

37. The Initial VOW Policy also contains provisions to make it obligatory and enforceable. Section I.4 of the Initial VOW Policy expressly forbids NAR's member boards from adopting rules ''more or less restrictive than, or otherwise inconsistent with'' the Initial VOW Policy, including the opt-out provisions and the anti-referral provision. Appendix A to the Initial VOW Policy provides for remedies and sanctions for violation of the Policy, including financial penalties and termination of MLS privileges.

38. On September 8, 2005, after plaintiff informed NAR of its intention to bring this action, NAR advised its member boards to suspend application and enforcement of the above-referenced provisions of the Initial VOW Policy, and announced its adoption of a new ''Internet Listings Display Policy'' and its revision of an MLS membership policy (together, the ''Modified VOW Policy''). NAR's Modified VOW Policy continues to impede brokers from using the Internet to serve home sellers and buyers more efficiently and cost effectively. NAR's Modified VOW Policy mandates that all of NAR's member boards enact rules implementing the Internet Listings Display Policy by July 1, 2006, but NAR subsequently communicated to its member boards that they ''wait to adopt'' the policy ''until th[is] litigation is over.''

39. Section I.3 of the Modified VOW Policy contains a blanket opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any competitor's Internet site. When exercised, this provision prevents a broker from providing over the Internet the same MLS information that brick-and-mortar brokers can provide in their offices. Additionally, NAR's Modified VOW Policy specifically exempts its own ''Official Site,'' Realtor.com, from the blanket opt out that applies to all Internet sites operated by brokers.

40. The portion of the Modified VOW Policy that is NAR's revision to its membership policies—much like the Initial VOW Policy's anti-referral rule—denies MLS membership and access to listings to brokers operating referral services. This membership policy effectively forbids Internet-based brokers from referring their customers to other brokers for a fee.

41. NAR's Modified VOW Policy includes other provisions that restrict brokers' ability to use the Internet to serve their customers effectively. The Modified VOW Policy, for example, allows MLSs to downgrade the quality of the data feed they provide brokers, effectively restraining brokers from providing innovative, Internet-based features to enhance the service they offer their customers. The Modified VOW Policy also permits MLSs to interfere with efficient ''cobranding'' relationships between brokers and entities that refer potential customers to the broker.

42. Defendant's policies, both the Initial VOW Policy and the Modified VOW Policy, thus prevent brokers from guaranteeing customers access through the Internet to all relevant listing information, increase the business risk and other costs associated with operating an efficient, Internet-intensive brokerage, deny brokers a source of high-quality referrals, and withhold from Internet brokers revenue streams permitted to other participants in the MLS. Moreover, the opt-out provisions provide brokers an effective tool to individually or collectively punish aggressive competition by any Internet-based broker.

43. Unless permanently restrained and enjoined, defendant will continue to engage in conduct that restricts competition from innovative brokers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

*Violation Alleged*

44. NAR's adoption of the above-referenced provisions in its Initial VOW Policy and its Modified VOW Policy, or equivalent provisions, constitutes a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

45. The aforesaid contract, combination, or conspiracy has had and will continue to have anticompetitive effects in the relevant markets, including:

a. Suppressing technological innovation;

b. Reducing competition on price and quality;

c. Restricting efficient cooperation among brokers;

d. Making express or tacit collusion more likely; and

e. Raising barriers to entry.

46. This contract, combination, or conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

*Request for Relief*

Wherefore, the United States prays that final judgment be entered against defendant declaring, ordering, and adjudging:

a. That the aforesaid contract, combination, or conspiracy unreasonably restrains trade and is illegal under Section 1 of the Sherman Act, 15 U.S.C. 1;

b. That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the opt-out provisions;

c. That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the anti-referral provision or an MLS membership restriction that denies MLS access to operators of Internet-based referral services;

d. That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules that restrict—or condition MLS access or MLS participation rights on—the method by which a broker interacts with his or her customers, competitor brokers, or other persons or entities;

e. That the Court grant such other relief as the United States may request and the Court deems just and proper; and

f. that the United States recover its costs in this action.

Dated: October 4, 2005.

/s/ _____

J. Bruce McDonald,

*Deputy Assistant Attorney General.*

/s/ _____

J. Robert Kramer II,

*Director of Operations.*

/s/ _____

Patrick J. Fitzgerald,

*United States Attorney, Northern District of Illinois, by Linda Wawzenski, Assistant United States Attorney.*

/s/ _____

Craig W. Conrath,
David C. Kully,
Mary Beth McGee,
Allen P. Grunes,
Lisa A. Scanlon,

*Attorneys for the United States, Department of Justice, Antitrust Division, 325 Seventh Street, NW., Suite 300, Washington, DC 20530, Telephone: (202) 305–9969, Facsimile: (202) 307–9952.*

**Certificate of Service**

I hereby certify that on this 4th day of October, 2005, I have caused a copy of the foregoing Amended Complaint be served by Federal Express upon counsel for Defendant in this matter:

Jack R. Bierig, Sidley Austin Brown & Wood, LLP, Bank One Plaza, 10 South Dearborn Street, Chicago, IL 60603.

/s/ _____

Linda Wawzenski

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

United States of America, Plaintiff, v. NATIONAL ASSOCIATION OF REALTORS,® Defendant

Civil Action No. 05 C 5140, Judge Kennelly, Magistrate Judge Denlow

**[Proposed] Final Judgment**

Whereas, Plaintiff, the United States of America, filed its Amended Complaint on October 4, 2005, alleging that Defendant National Association of Realtors® (''NAR'') adopted policies that restrain competition from innovative real estate brokers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any issue of fact or law;

Whereas, Defendant has not admitted and does not admit either the allegations set forth in the Amended Complaint or any liability or wrongdoing;

Whereas, the United States does not allege that Defendant's Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws; and

Whereas, the United States requires Defendant to agree to certain procedures and prohibitions for the purpose of preventing the loss of competition alleged in the Complaint;

*Now* therefore, before any testimony is taken, without trial or adjudication of any issue of fact, and upon consent of the parties, *it is ordered, adjudged and decreed:*

**I. Jurisdiction**

This Court has jurisdiction over the Parties and subject matter of this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 1 of the Sherman Act, as amended (15 U.S.C. 1).

**II. Definitions**

As used in this Final Judgment:

A. ''Broker'' means a Person licensed by a state to provide services to a buyer or seller in connection with a real estate transaction. The term includes any Person who possesses a Broker's license and any agent or sales associate who is affiliated with such a Broker.

B. ''Customer'' means a seller client of a Broker or a Person who has expressed to a Broker an interest in purchasing residential real property and who has described the type, features, or location of the property in which he or she has an interest, entitling the Broker to Provide the Customer multiple listing service (''MLS'') listing information by any method (*e.g.*, by hand, mail, facsimile, electronic mail, or display on a VOW).

C. ''Final Judgment'' includes the Modified VOW Policy attached as Exhibit A and the definition of MLS Participant and accompanying Note attached as Exhibit B.

D. ''ILD Policy'' means the ''ILD (internet Listing Display) Policy'' that NAR adopted on or about August 31, 2005, and any amendments thereto.

E. ''Including'' means including, but not limited to.

F. ''Listing Information'' means all records of residential properties (and any information relating to those properties) stored or maintained by a multiple listing service.

G. ''Member Board'' means any state or local Board of Realtors® or Association of Realtors®, including any city, county, inter-county, or inter-state Board or Association, and any multiple listing service owned by, or affiliated with, any such Board of Realtors® or Association of Realtors®.

H. ''Modified VOW Policy'' means the policy attached to this Final Judgment as Exhibit A.

I. ''NAR'' means the National Association of Realtors®, its predecessors, successors, divisions, subsidiaries, affiliates, partnerships, and joint ventures and all directors, officers, employees, agents, and representatives of the foregoing. The terms ''subsidiary,'' ''affiliate,'' and joint venture'' refer to any Person in which there is or has been partial (twenty percent or more) or total ownership or control between NAR and any other Person.

J. ''Person'' means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

K. ''Provide'' means to deliver, display, disseminate, convey, or reproduce.

L. ''Rule'' means any rule, model rule, ethical rule, bylaw, policy, standard, or guideline and any interpretation of any Rule issued or approved by NAR,

whether or not the final implementation date of any such Rule has passed.

M. ''VOW'' or ''virtual office website'' means a website, or feature of a website, operated by a Broker or for a Broker by another Person through which the Broker is capable of providing real estate brokerage services to consumers with whom the Broker has first established a Broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Broker's oversight, supervision, and accountability.

N. ''VOW Policy'' means the ''Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants (''Virtual Office Websites''),'' adopted by NAR on or about May 17, 2003, and any amendments thereto.

O. The terms ''and'' and ''or'' have both conjunctive and disjunctive meanings:

**III. Applicability**

This Final Judgment applies to NAR and all other Persons in active concert or participation with NAR who have received actual notice of this Final Judgment. A Member Board shall not be deemed to be in active concert with NAR solely as a consequence of the Member Board's receipt of actual notice of this Final Judgment and its affiliation with or membership in NAR and its involvement in regular activities associated with its affiliation with or membership in NAR (e.g., coverage under a NAR insurance policy, attendance at NAR meetings or conventions, or review of Member Board policies by MAR).

**IV. Prohibited Conduct**

Subject to the provisions of Sections V and VI of this Final Judgment, the Modified VOW Policy (Exhibit A), and the definition of MLS Participant and accompanying Note (Exhibit B), NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly.

A. Prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

B. Unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

C. Prohibits, restricts, or impedes the referral of Customers whose identities are obtained from a VOW by a Broker who uses a VOW to any other Person, or establishes the price of any such referral;

D. Imposes tees or costs upon any Broker who operates a VOW or upon any Person who operates a VOW for any Broker that exceed the reasonably estimated actual costs incurred by a Member Board in providing Listing Information to the Broker or Person operating the VOW or in performing any other activities relating to the VOW, or discriminates in such VOW related fees or costs between those imposed upon a Broker who operates a VOW and those imposed upon a Person who operates a VOW for a Broker, unless the MLS incurs greater costs in providing a service to a Person who operates a VOW for a Broker than it incurs in providing the same service to the Broker; or

E. Is inconsistent with the Modified VOW Policy.

**V. Required Conduct**

A. Within five business days after entry of this Final Judgment, NAR shall repeal the ILD Policy and direct each Member Board that adopted Rules implementing the ILD Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

B. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards that adopted Rules implementing the VOW Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

C. Within five business days after entry of this Final Judgment, NAR shall adopt the Modified VOW Policy. NAR shall not change the Modified VOW Policy without either obtaining advance written approval by the United States Department of Justice, Antitrust Division (''DOJ'') or an order of the Court pursuant to Section VIII of this Final Judgment authorizing the proposed modification.

D. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards to adopt the Modified VOW Policy within ninety days after entry of this Final Judgment, and to thereafter maintain, act consistently with, and enforce Rules implementing the Modified VOW Policy. NAR shall simultaneously direct Member Boards, beginning upon receipt of the directive, not to adopt, maintain, or enforce any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs).

E. If NAR determines that a Member Board has not timely adopted or maintained, acted consistently with, or enforced Rules implementing the Modified VOW Policy, it shall, within thirty days of such determination, direct in writing that the Member Board do so. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to adopt, maintain, act consistently with, and enforce rules implementing the Modified VOW Policy. NAR shall also notify the DOJ of the identity of that Member Board and the Modified VOW Policy provisions it refused to adopt, maintain, act consistently with, or enforce. For purposes of this provision, a failure of a Member Board to adopt, maintain, act consistently with, or enforce Rules implementing the Modified VOW Policy within ninety days of a written directive to that Member Board from NAR shall constitute a refusal by the Member Board to do so.

F. If NAR determines that a Member Board has adopted, maintained, or enforced any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs), it shall, within thirty days of such determination, direct in writing that the Member Board rescind and cease to enforce that Rule or practice. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to rescind and cease to enforce that Rule or practice. NAR shall also notify the DOJ of the identity of that Member Board and the Rule or practice it refused to rescind and cease to enforce. For purposes of this provision, a Member Board's failure to rescind and cease to enforce the Rule or practice within ninety days of a written directive from NAR shall constitute a refusal by the Member board to do so.

G. Within thirty days of entry of this Final Judgment, NAR shall designate an Antitrust Compliance Officer with

responsibility for educating Member Boards about the antitrust laws and for achieving full compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

(1) Supervising NAR's review of Rules of NAR's Member Boards for compliance with this Final Judgment and the Modified VOW Policy;

(2) Maintaining copies of any communications with any Person containing allegations of any Member Board's (i) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (ii) failure to enforce any Rules implementing the Modified VOW Policy;

(3) Reporting to the United States 180 days after entry of this Final Judgment and again on the first anniversary of the entry of this Final Judgment, the identity of each Member Board that has not adopted Rules implementing the Modified VOW Policy;

(4) Ensuring that each of NAR's Member Boards that owns or Operates a multiple listing service are provided briefing materials, within ninety days of the entry of this Final Judgment, on the meaning and requirements of the Modified VOW Policy and this Final Judgment; and

(5) Holding an annual program for NAR Member Boards and their counsel that includes a discussion of the antitrust laws (as applied to such Member Boards) and this Final Judgment.

H. NAR shall maintain and shall furnish to the DOJ on a quarterly basis (beginning ninety days after entry of this Final Judgment) copies of any communications with any Person containing allegations of any Member's Board's (1) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (2) failure to enforce any Rules implementing the Modified VOW Policy.

I. Within five business days after entry of this Final Judgment, NAR shall provide, in a prominent size and location on its Web site (*www.realtor.org*) a hyperlink to a Web page on which NAR has published copies of

(1) This Final Judgment;

(2) A notification that Member Boards must repeal any Rules implementing the ILD and VOW Policies (in accordance with Sections V.A and V.B of this Final Judgment); and

(3) A copy of the Modified VOW Policy.

NAR shall also publish each of the three above items in the first issue of Realtor® Magazine scheduled for publication after the date of entry of this Final Judgment.

**VI. Permitted Conduct**

A. Subject to Section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting and maintaining the definition of MLS Participant and the accompanying Note, together attached as Exhibit B. However, NAR shall direct each Member Board not to suspend or expel any Broker from multiple listing service membership or participation for reasons of the Broker's then-failure to qualify for membership or participation under the definition of MLS Participant and the accompanying Note, together attached as Exhibit B, until May 27, 2009.

B. Notwithstanding any of the above provisions, and subject to Section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting, maintaining, or enforcing Rules that are generally applicable on their face and that do not, in their application, unreasonably restrict any method of delivery of Listing Information to Customers.

**VII. Compliance Inspection**

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the DOJ, including consultants and other Persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to NAR, be permitted:

(1) Access during NAR's office hours to inspect and copy, or at the option of the United States, to require NAR to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of NAR, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, NAR's officers, employees, or agents, who may have their individual counsel and counsel for NAR present, regarding such matters. The interviews shall he subject to the reasonable convenience of the interviewee and without restraint or interference by NAR. NAR may, however, prevent the interviewee from divulging matters protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, NAR shall submit written reports or response to written interrogatories, under oath if requested, relating to its compliance with any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any Person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by NAR to the United States, NAR marks as confidential any pertinent page of such material on the grounds that such page contains information as to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, then the United States shall give NAR ten calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

**VIII. Retention of Jurisdiction**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

**IX. No Limitation on Government Rights**

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards.

**X. Expiration of Final Judgment**

This Final Judgment shall expire ten years from the date of its entry.

**XI. Public Interest Determination**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated:

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16

Matthew F. Kennelly,
*United States District Judge.*

**Exhibit A**

Policy Governing Use of MLS Data in Connection With Internet Brokerage Services Offered by MLS Participants (''Virtual Office Websites'')

**I. Definitions and Scope of Policy**

1. For purposes of this Policy, the term Virtual Office Website (''VOW'') refers to a Participant's Internet website, or a feature of a Participant's Internet website, through which the Participant is capable of providing real estate brokerage services to consumers with whom the Participant has first established a broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Participant's oversight, supervision, and accountability.

a. A Participant may designate an Affiliated VOW Partner (''AVP'') to operate a VOW on behalf of the Participant, subject to the Participant's supervision and accountability and the terms of this Policy.

b. A non-principal broker or sales licensee, affiliated with a Participant, may, with the Participant's consent, operate a VOW or have a VOW operated on its behalf by an AVP. Such a VOW is subject to the Participant's supervision and accountability and the terms of this Policy.

c. Each use of the term ''Participant'' in this Policy shall also include a Participant's non-principal brokers and sales licensees (with the exception of references in this section to the ''Participant's consent'' and the ''Participant's supervision and accountability,'' and in section III.l0.a, below, to the ''Participant acknowledges''). Each reference to ''VOW'' or ''VOWs'' herein refers to all VOWs, whether operated by a Participant, by a non-principal broker or sales licensee, or by an AVP.

2. The right to display listings in response to consumer searches is limited to display of MLS data supplied by the MLS(s) in which the Participant has participatory rights. This does not preclude a firm with offices participating in different MLSs from operating a master website with links to such offices' VOWs.

3. Participants' Internet websites, including those operated for Participants by AVPs, may also provide other features, information, or services in addition to VOWs (including the Internet Data Exchange (''IDX'') function).

4. The display of listing information on a VOW does not require separate permission from the Participant whose listings will be available on the VOW.

5. Except as permitted in Sections III and IV, MLSs may not adopt rules or regulations that conflict with this Policy or that otherwise restrict the operation of VOWs by Participants.

**II. Policies Applicable to Participants' VOWs**

1. A Participant may provide brokerage services via a VOW that include making MLS active listing data available, but only to consumers with whom the Participant has first established a lawful consumer-broker relationship, including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers (hereinafter ''Registrants''). Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s).

2. A Participant's VOW must obtain the identity of each Registrant and obtain each Registrant's agreement to Terms of Use of the VOW, as follows:

a. A Registrant must provide his or her name and a valid email address. The Participant must send an email to the address provided by the Registrant confirming that the Registrant has agreed to the Terms of Use (described in subsection c below). The Registrant may be permitted to access the VOW only after the Participant has verified that the email address provided is valid and that Registrant received the Terms of Use confirmation.

b. The Registrant must supply a user name and a password, the combination of which must be different from those of all other Registrants on the VOW, before being permitted to search and retrieve information from the MLS database via the VOW. The user name and password may be established by the Registrant or may be supplied by the Participant, at the option of the Participant. An email address may be associated with only one user name and password. The Registrant's password and access must expire on a date certain but may be renewed. The Participant must at all times maintain a record of the name and email address supplied by the Registrant, and the username and current password of each Registrant. Such records must be kept for not less than 180 days after the expiration of the validity of the Registrant's password. If the MLS has reason to believe that a Participants's VOW has caused or permitted a breach in the security of the data or a violation of MLS rules related to use by one or more Registrants, the Participant shall, upon request, provide to the MLS a copy of the record of the name, email address, user name, current password, and audit trail, if required, of any Registrant identified by the MLS to be suspected of involvement in the violation.

c. The Registrant must be required affirmatively to express agreement to a ''Terms of Use'' provision that requires the Registrant to open and review an agreement that provides at least the following:

i. That the Registrant acknowledges entering into a lawful consumer-broker relationship with the Participant;

ii. That all data obtained from the VOW is intended only for the Registrant's personal, non-commercial use;

iii. That the Registrant has a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through the VOW;

iv. That the Registrant will not copy, redistribute, or retransmit any of the data or information provided;

v. That the Registrant acknowledges the MLS's ownership of, and the validity of the MLS's copyright in, the MLS database.

After the Registrant has opened for viewing the Terms of Use agreement, a ''mouse click'' is sufficient to acknowledge agreement to those terms. The Terms of Use Agreement may not impose a financial obligation on the Registrant or create any representation agreement between the Registrant and the Participant.

The Terms of Use agreement shall also expressly authorize the MLS, and other MLS Participants or their duly authorized representatives, to access the VOW for the purposes of verifying compliance with MLS rules and monitoring display of Participants' listings by the VOW.

d. An agreement entered into at any time between the Participant and Registrant imposing a financial obligation on the Registrant or creating representation of the Registrant by the Participant must be established separately from the Terms of Use, must be prominently labeled as such, and may not be accepted solely by mouse click.

3. A Participant's VOW must prominently display an e-mail address, telephone number, or specific identification of another mode of communication (e.g., live chat) by which a consumer can contact the Participant to ask questions, or get more information, about properties displayed on the VOW. The Participant, or a non-

principal broker or sales licensee licensed with the Participant, must be willing and able to respond knowledgeably to inquiries from Registrants about properties within the market area served by that Participant and displayed on the VOW.

4. A Participant's VOW must protect the MLS data from misappropriation by employing reasonable efforts to monitor for and prevent ''scraping'' or other unauthorized accessing, reproduction, or use of the MLS database.

5. A Participant's VOW must comply with the following additional requirements:

a. No VOW shall display listings or property addresses of sellers who have affirmatively directed their listing brokers to withhold their listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as email, fax, or otherwise, the listings of sellers who have determined not to have the listing for their property displayed on the Internet.

b. A Participant who lists a property for a seller who has elected not to have the property listing or the property address displayed on the Internet shall cause the seller to execute a document that conforms to the form attached to this Policy as Appendix A. The Participant shall retain such forms for at least one year from the date they are signed.

c. With respect to any VOW that

(i) Allows third-parties to write comments or reviews about particular listings or displays a hyperlink to such comments or reviews in immediate conjunction with particular listings, or

(ii) Displays an automated estimate of the market value of the listing (or hyperlink to such estimate) in immediate conjunction with the listing,

The VOW shall disable or discontinue either or both of those features as to the seller's listing at the request of the seller. The listing broker or agent shall communicate to the MLS that the seller has elected to have one or both of these features disabled or discontinued on all Participants' websites. Except for the foregoing and subject to subparagraph (d), a Participant's VOW may communicate the Participant's professional judgment concerning any listing. Nothing shall prevent a VOW from notifying its customers that a particular feature has been disabled ''at the request of the seller.''

d. A VOW shall maintain a means (e.g., e-mail address, telephone number) to receive comments about the accuracy of any data or information that is added by or on behalf of the VOW operator beyond that supplied by the MLS and that relates to a specific property displayed on the VOW. The VOW operator shall correct or remove any false data or information relating to a specific property upon receipt of a communication from the listing broker or listing agent for that property explaining why the data or information is false. However, the VOW operator shall not be obligated to remove or correct any data or information that simply reflects good faith opinion, advice, or professional judgment.

e. Each VOW shall refresh MLS data available on the VOW not less frequently than every 3 days.

f. Except as provided elsewhere in this Policy or in MLS rules and regulations, no portion of the MLS database may be distributed, provided, or made accessible to any person or entity.

g. Every VOW must display a privacy Policy that informs Registrants of the ways in which information obtained from them will be used.

h. A VOW may exclude listings from display based only on objective criteria, including, but not limited to, factors such as geography, list price, type of property, cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®.

6. A Participant who intends to operate a VOW must notify the MLS of its intention to establish a VOW and must make the VOW readily accessible to the MLS and to all MLS Participants for purposes of verifying compliance with this Policy and any other applicable MLS rules or policies.

7. A Participant may operate more than one VOW itself or through an AVP. A Participant who operates a VOW itself shall not be precluded from also operating VOWs in conjunction with AVPs.

**III. Policies Applicable to Multiple Listing Services**

1. A Multiple Listing Service shall permit MLS Participants to operate VOWs, or to have VOWs operated for them by AVPs, subject to the requirements of state law and this Policy.

2. An MLS shall, if requested by a Participant, provide basic ''downloading'' of all MLS nonconfidential listing data, including without limitation address fields, listings types, photographs, and links to virtual tours. Confidential data includes only that which Participants are prohibited from providing to customers orally and by all other delivery mechanisms. They include fields containing the information described in paragraph IV(1) of this Policy, provided that sold data (i.e., listing information relating to properties that have sold) shall be deemed confidential and withheld from a download only if the actual sales prices of completed transactions are not accessible from public records. For purposes of this Policy, ''downloading'' means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis. An MLS may also offer a transient download. In such case, it shall also, if requested, provide a persistent download, provided that it may impose on users of such (download the approximate additional costs incurred by it to do so.

3. This Policy does not require an MLS to establish publicly accessible sites displaying Participants' listings.

4. If an MLS provides a VOW-specific feed, that feed must include all of the nonconfidential data included in the feed described in paragraph 2 above except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the Internet.

5. An MLS may pass on to those Participants who will download listing information the reasonably estimated costs incurred by the MLS in adding or enhancing its ''downloading'' capacity to enable such Participants to operate VOWs.

6. An MLS may require that Participants (1) utilize appropriate security protection, such as firewalls, as long as such requirement does not impose security obligations greater than those employed concurrently by the MLS, and/or (2) maintain an audit trail of Registrants' activity on the VOW and make that information available to the MLS if the MLS has reason to believe that any VOW has caused or permitted a breach in the security of the data or a violation of applicable MLS rules.

7. An MLS may not prohibit or regulate display of advertising or the identification of entities on VOWs (''branding'' or ''co-branding''), except to prohibit deceptive or misleading advertising or co-branding. For purposes of this provision, co-branding will be presumed not to be deceptive or misleading if the Participant's logo and contact information (or that of at least one Participant, in the case of a VOW established and operated by or for more than one Participant) is displayed in immediate conjunction with that of every other party, and the logo and

contact information of all Participants displayed on the VOW is as large as the logo of the AVP and larger than that of any third party.

8. Except as provided in this Policy, an MLS may not prohibit Participants from enhancing their VOWs by providing information obtained from sources other than the MLS, additional technological services (such as mapping functionality), or information derived from nonconfidential MLS data (such as an estimated monthly payment derived from the listed price), or regulate the use or display of such information or technological services on any VOW.

9. Except as provided in generally applicable rules or policies (such as the Realtor® Code of Ethics), an MLS may not restrict the format of data display on a VOW or regulate the appearance of VOWs.

10. Subject to the provisions below, an MLS shall make MLS listing data available to an AVP for the exclusive purpose of operating a VOW on behalf of a Participant. An MLS shall make MLS listing data available to an AVP under the same terms and conditions as those applicable to Participants. No AVP has independent participation rights in the MLS by virtue of its right to receive data on behalf of a Participant, or the right to use MLS data except in connection with operation of a VOW for a Participant. AVP access to MLS data is derivative of the rights of the Participant on whose behalf the AVP is downloading data.

a. A Participant, non-principal broker or sales licensee, or AVP may establish the AVP's right to receive and use MLS data by providing to the MLS a writing in which the Participant acknowledges its or its non-principal broker's or sales licensee's selection of the AVP to operate a VOW on its behalf.

b. An MLS may not charge an AVP, or a Participant on whose behalf an AVP operates a VOW, more than a Participant that chooses to operate a VOW itself (including any fees or costs associated with a license to receive MLS data, as described in (g), below), except to the extent that the MLS incurs greater costs in providing listing data to the AVP than the MLS incurs in providing listing data to a Participant.

c. An MLS may not place data security requirements or restrictions on use of MLS listing data by an AVP that are not also imposed on Participants.

d. An MLS must permit an AVP to download listing information in the same manner (e.g., via a RETS feed or via an FTP download), at the same times and with the same frequency that the MLS permits Participants to download listing information.

e. An MLS may not refuse to deal directly with an AVP in order to resolve technical problems with the data feed. However, the MLS may require that the Participant on whose behalf the AVP is operating the VOW participate in such communications if the MLS reasonably believes that the involvement of the Participant would be helpful in order to resolve the problem.

f. An MLS may not condition an AVP's access to a data feed on the financial terms on which the AVP provides the site for the Participant.

g. An MLS may require Participants and AVPs to execute license or similar agreements sufficient to ensure that Participants and AVPs understand and agree that data provided by the MLS may be used only to establish and operate a VOW on behalf of the Participant and not for any other purpose.

h. An MLS may not (i) prohibit an AVP from operating VOWs on behalf of more than one Participant, and several Participants may designate an AVP to operate a single VOW for them collectively, (ii) limit the number of entities that Participants may designate as AVPs for purposes of operating VOWs, or (iii) prohibit Participants from designating particular entities as AVPs except that, if an AVP's access has been suspended or terminated by an MLS, that MLS may prevent an entity from being designated an AVP by another Participant during the period of the AVP's suspension or termination.

i. Except as stated below, an MLS may not suspend or terminate an AVP's access to data (a) for reasons other than those that would allow an MLS to suspend or terminate a Participant's access to data, or (b) without giving the AVP and the associated Participant(s) prior notice and the process set forth in the applicable provisions of the MLS rules for suspension or termination of a Participant's access. Notwithstanding the foregoing, an MLS may immediately terminate an AVP's access to data (a) if the AVP is no longer designated to provide VOW services to any Participant, (b) if the Participant for whom the AVP operates a VOW ceases to maintain its status with the MLS, (c) if the AVP has downloaded data in a manner not authorized for Participants and that hinders the ability of Participants to download data, or (d) if the associated Participant or AVP has failed to make required payments to the MLS in accordance with the MLS's generally applicable payment policies and practices.

11. An MLS may not prohibit, restrict, or impede a Participant from referring Registrants to any person or from obtaining a fee for such referral.

**IV. Requirements That MLSs May Impose on the Operation of VOWs and Participants**

1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

i. Expired, withdrawn, or pending listings.

ii. Sold data unless the actual sales price of completed transactions is accessible from public records.

iii. The compensation offered to other MLS Participants.

iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.

v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.

vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

b. The content of MLS data that is displayed on a VOW may not he changed from the content as it is provided in the MLS. MLS data may be augmented with additional data or information not otherwise prohibited from display as long as the source of such other data or information is clearly identified. This requirement does not restrict the format of MLS data display on VOWs or display of fewer than all of the listings or fewer authorized data fields.

c. There shall be a notice on all MLS data displayed indicating that the data is deemed reliable but is not guaranteed accurate by the MLS. A Participant's VOW may also include other appropriate disclaimers necessary to protect the Participant and/or the MLS from liability.

d. Any listing displayed on a VOW shall identify the name of the listing firm in a readily visible color, and reasonably prominent location, and in typeface not smaller than the median typeface used in the display of listing data.

e. The number of current or, if permitted, sold listings that Registrants may view, retrieve, or download on or from a VOW in response to an inquiry may be limited to a reasonable number.

Such number shall be determined by the MLS, but in no event may the limit be fewer than 100 listings or 5% of the listings in the MLS, whichever is less.

f. Any listing displayed on a VOW shall identify the name of the listing agent.

2. An MLS may also impose the following other requirements on the operation of VOWs:

a. Participants displaying other brokers' listings obtained from other sources, e.g., other MLSs, non-participating brokers, etc. shall display the source from which each such listing was obtained.

b. A maximum period, no shorter than 90 days and determined by the MLS, during which Registrants' passwords are valid, after which such passwords must be changed or reconfirmed.

3. An MLS may not prohibit Participants from downloading and displaying or framing listings obtained from other sources, e.g., other MLSs or from brokers not participating in that MLS, etc., but may require either that (i) such information be searched separately from listings obtained from other sources, including other MLSs, or (ii) if such other sources are searched in conjunction with searches of the listings available on the VOW, require that any display of listings from other sources identify such other source.

**EFFECTIVE DATE:** MLSs have until not later than [90 DAYS AFTER ENTRY OF THE FINAL JUDGMENT] to adopt rules implementing the foregoing policies and to comply with the provisions of section III above, and (2) Participants shall have until not later than 180 days following adoption and implementation of rules by an MLS in which they participate to cause their VOW to comply with such rules.

See Appendix A for Seller Opt-Out Form.

**Appendix A—Seller Opt-Out Form**

1. [Check one]

a. [Check here] I have advised my broker or sales agent that I do not want the listed property to be displayed on the Internet; or

b. [Check here] I have advised my broker or sales agent that I do not want the address of the listed property to be displayed on the Internet.

2. I understand and acknowledge that, if I have selected option a, consumers who conduct searches for listings on the Internet will not see information about the listed property in response to their search.

_____

initials of seller

**BILLING CODE 4410–11–M**

**Exhibit B**

-(Statement of MLS Policy)
**Statement 7.9 . . . Definition of MLS "Participant"**

The term "Participant" in a Board Multiple Listing Service is defined, as follows:

"Where the term REALTOR® is used in this explanation of policy in connection with the word 'Member' or the word 'Participant', it shall be construed to mean the REALTOR® principal or principals, of this or any other Board, or a firm comprised of REALTOR® principals participating in a Multiple Listing Service owned and operated by the Board. Participatory rights shall be held by an individual principal broker unless determined by the Board or MLS to be held by a firm. It shall not be construed to include individuals other than a principal or principals who are REALTOR® Members of this or any other Board, or who are legally entitled to participate without Board membership. However, under no circumstances is any individual or firm, regardless of membership status, entitled to MLS 'Membership' or 'Participation' unless they hold a current, valid real estate broker's license and ~~are capable of offering and accepting~~ offer or accept cooperation and compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property. Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey 'Participation' or 'Membership' or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. Additionally, the foregoing does not prohibit Board Multiple Listing Services, at their discretion, from categorizing non-principal brokers, sales licensees, licensed and certified appraisers and others affiliated with the MLS 'Members' or 'Participants' as 'users' or 'subscribers' and, holding such individuals personally subject to the rules and regulations and any other governing provisions of the MLS and to discipline for violations thereof. MLSs may, as a matter of local determination, limit participatory rights to individual principal brokers, or to their firms, and to licensed or certified appraisers, who maintain an office or Internet presence from which they are available to represent real estate sellers, buyers, lessors or lessees or from which they provide appraisal services. (Amended 5/02)

Where the terms 'subscriber' or 'user' are used in connection with a Multiple Listing Service owned or operated by a Board of REALTORS®, they refer to non-principal brokers, sales licensees, and licensed and certified real estate appraisers affiliated with an MLS Participant and may, as a matter of local option, also include a Participant's affiliated unlicensed administrative and clerical staff, personal assistants, and individuals seeking licensure or certification as real estate appraisers provided that any such individual is under the direct supervision of an MLS Participant or the Participant's licensed designee. If such access is available to unlicensed or uncertified individuals, their access is subject to the rules and regulations, the payment of applicable fees and charges (if any), and the limitations and restrictions of state law. None of the foregoing shall diminish the Participant's ultimate responsibility for ensuring compliance with the rules and regulations of the MLS by all individuals affiliated with the Participant. (Adopted 4/92)

Under the 'Board of Choice' policy, MLS participatory rights shall be available to any REALTOR® (principal) or any firm comprised of REALTORS® (principals) irrespective of where they hold primary membership subject only to their agreement to abide by any MLS rules or regulations; agreement to arbitrate disputes with other Participants; and payment of any MLS dues, fees, and charges." Participatory rights granted under Board of Choice do not confer voting privileges or eligibility for office as an MLS committee member, officer, or director, except as granted at the discretion of the local Board and/or MLS. (Amended 5/97)

The universal access to services component of Board of Choice is to be interpreted as requiring that MLS Participatory rights be available to REALTOR® principals, or to firms comprised of REALTOR® principals, irrespective of where primary or secondary membership is held. This does not preclude an MLS from assessing REALTORS® not holding primary or secondary membership locally fees, dues, or charges that exceed those or, alternatively, that are less than those charged Participants holding such memberships locally or additional fees to offset actual expenses incurred in providing MLS services such as courier charges, long distance phone charges, etc., or for charging any Participant specific fees for optional additional services. (Amended 11/96)

None of the foregoing shall be construed as requiring a Board to grant MLS participatory rights, under Board of Choice, where such rights have been previously terminated by action of that Board's Board of Directors." (Adopted 11/95)

(Model MLS rules)
**Section 3—Participation:** Any REALTOR® of this or any other Board who is a principal, partner, corporate officer, or branch office manager acting on behalf of a principal, without further qualification, except as otherwise stipulated in these bylaws, shall be eligible to participate in Multiple Listing upon agreeing in writing to conform to the rules and regulations thereof and to pay the costs incidental thereto.* However, under no circumstances is any individual or firm, regardless of membership status, entitled to Multiple Listing Service "membership" or "participation" unless they hold a current, valid real estate broker's license and ~~are capable of offering and accepting~~ offer or accept compensation to and from other Participants or are licensed or certified by an appropriate

state regulatory agency to engage in the appraisal of real property.** Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey "participation" or "membership" or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. (Amended 11/96)

Note: Mere possession of a broker's license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm 'offers or accepts cooperation and compensation' means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. "Actively" means on a continual and on-going basis during the operation of the Participant's real estate business. The "actively" requirement is not intended to preclude MLS participation by a Participant or potential Participant that operates a real estate business on a part time, seasonal, or similarly time-limited basis or that has its business interrupted by periods of relative inactivity occasioned by market conditions. Similarly, the requirement is not intended to deny MLS participation to a Participant or potential Participant who has not achieved a minimum number of transactions despite good faith efforts. Nor is it intended to permit an MLS to deny participation based on the level of service provided by the Participant or potential Participant as long as the level of service satisfies state law.

The key is that the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation with respect to properties of the type that are listed on the MLS in which participation is sought. This requirement does not permit an MLS to deny participation to a Participant or potential Participant that operates a Virtual Office Website ("VOW") (including a VOW that the Participant uses to refer customers to other Participants) if the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation. An MLS may evaluate whether a Participant or potential Participant "actively endeavors during the operation of its real estate business" to "offer or accept cooperation and compensation" only if the MLS has a reasonable basis to believe that the Participant or potential Participant is in fact not doing so.

The membership requirement shall be applied on a nondiscriminatory manner to all Participants and potential Participants.

BILLING CODE 4410–11–C

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

United States Of America, Plaintiff, v. National Association of Realtors®, Defendant. Civil Action No. 05 C 5140, Judge Kennelly

## Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

## I. Nature and Purpose of the Proceedings

*Overview.* The United States brought this lawsuit against Defendant National Association of Realtors® (''NAR'') on September 8, 2005, to stop NAR from violating Section 1 of the Sherman Act, 15 U.S.C. 1, by its suppression of competition from real estate brokers who use the Internet to deliver real estate brokerage services. NAR's policies singled out these innovative brokers and denied them equal access to the for-sale listings that are the lifeblood of competition in real estate markets. The settlement will eliminate NAR's discriminatory policies and restore even-handed treatment for all brokers, including those who use the Internet in innovative ways.

*Virtual Office Websites (''VOWs'').* The brokers who have been restrained by NAR's policies operate password-protected Web sites through which they deliver brokerage services to consumers. NAR has referred to these websites as ''virtual office websites'' or ''VOWs.'' As discussed below and in the United States' October 4, 2005, Amended Complaint, brokers who use VOWs (''VOW brokers'') can operate more productively than other brokers, providing high quality brokerage services efficiently to consumers.

*Defendant NAR and MLSs.* NAR is a trade association whose membership includes both traditional, bricks-and-mortar real estate brokers and innovative brokers, such as those who operate VOWs. NAR promulgates rules for the operation of the approximately 800 multiple listing services (''MLSs'') affiliated with NAR. MLSs are joint ventures of virtually all real estate brokers in each local or regional area. MLSs aggregate information about all properties in the areas they serve that are offered for sale through brokers.

*NAR's Challenged Policies.* On May 17, 2003, NAR adopted its ''VOW Policy,'' which contained rules that obstructed brokers' abilities to use VOWs to serve their customers, as described below in Section II. After an investigation, the United States prepared to file a complaint challenging this Policy.

On September 8, 2005, NAR repealed its VOW Policy and replaced it with its Internet Listings Display Policy (''ILD Policy''). NAR hoped that this change would forestall the United States' challenge to its policies. NAR's ILD Policy, however, continued to discriminate against VOW brokers. As part of its adoption of the ILD Policy, NAR also revised and reinterpreted its MLS membership rule, which would have excluded some brokers who used VOWs, as detailed below in Section II. (NAR's VOW and ILD Policies, including its membership rule revision and reinterpretation, are referred to collectively in this Competitive Impact Statement as NAR's ''Challenged Policies.'')

As an association of competitors with market power, NAR's adoption of policies that suppress new and efficient competition to the detriment of consumers violates Section 1 of the Sherman Act, 15 U.S.C. 1.

*The Complaint.* On September 8, 2005, the day NAR adopted its ILD Policy, the United States tiled its Complaint. The United States filed an Amended Complaint on October, 4, 2005, that explicitly addressed the ILD Policy and membership rule revision

and reinterpretation. The Amended Complaint alleges that NAR's adoption of the Challenged Policies constitutes a contract, combination, and conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

In the Amended Complaint, the United States asks the Court to order NAR to stop violating the law. The United States did not seek monetary damages or fines; the law does not provide for these remedies in a case of this nature.

*Motion to Dismiss.* NAR filed a motion to dismiss the case, claiming that, because NAR did not restrain brokers by compelling them to use the ''opt-out'' provisions of the Challenged Policies (discussed below in Section II.C), those provisions did not constitute actionable restraints of trade. NAR also sought dismissal on two procedural grounds. On November 27, 2006, the Court issued an opinion denying NAR's motion. The Court found that the appropriate analysis under Section 1 is not whether individual market actors are restrained but instead whether competition is restrained.[1] The Court also rejected NAR's procedural arguments.[2]

*Course of the Litigation.* Discovery began in December 2005 and continued through 2006 and 2007. The case was scheduled for trial on July 7, 2008.

*Proposed Settlement.* On May 27, 2008, six weeks before trial was scheduled to begin, the United States and NAR reached a settlement. The United States filed a Stipulation and proposed Final Judgment that are designed to eliminate the likely anticompetitive effects of NAR's Challenged Policies. The proposed Final Judgment, which is explained more fully below, requires NAR to repeal its VOW Policy and its ILD Policy and to adopt and apply new rules that do not discriminate against brokers who use VOWs to provide brokerage services to their customers.

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

## II. Description of the Events Giving Rise to the Alleged Violation of the Antitrust Laws

### *A. Description of Competition and Innovation Enabled by VOWs*

In many respects, most VOW brokers operate just like their more traditional competitors. They hold brokers' licenses in the states in which they operate, they ordinarily are Realtor members of NAR, they participate in their local MLS, they tour homes with potential buyer customers and guide those customers through the negotiating, contracting, and closing process, and they derive revenues from commissions earned in connection with real estate transactions.[3]

These VOW brokers differ from other brokers in how they use the Internet to provide brokerage services. VOW brokers use primarily their websites, rather than the efforts of their agents, to educate potential buyers about the market.

This service necessarily involves—as it does with brokers who operate in a more traditional fashion providing those MLS listings to buyer customers that meet their expressed needs and interests. NAR's MLS rules permit brokers to ''reproduce from the MLS compilation and distribute to prospective purchasers'' information about properties in which the purchaser might have an interest. See NAR, Handbook on Multiple Listing Policy, ''Model Rules & Regulations for an MLS Operated as a Committee of an Association of Realtors®,'' § 12.2 (21st ed. 2008). Rather than providing this information to prospective buyers by hand delivery, mail, fax, or e-mail—the delivery methods historically used by brokers—VOW brokers deliver listings over the Internet.[4]

VOWs help brokers operate more efficiently and increase the quality of services they provide. By enabling consumers to search for and retrieve relevant MLS listings, VOW brokers can operate more efficiently than other brokers. Because customers are educating themselves without the broker's expenditure of time, a VOW broker can expend less time, energy, and resources educating his or her customers. Operating a VOW can also enhance broker competitiveness in working with home seller clients by allowing the broker to provide detailed information to both potential and active seller clients about the apparent interests of buyers who are searching for homes in the seller's neighborhood. A study conducted in connection with this case showed that one sizeable VOW broker, for example, was able to generate many more transactions per agent (controlling for years of agent experience) than the traditional brokers it competed against.

With lower costs and increased productivity, some VOW brokers have offered discounted commission rates to their seller clients and rebates to their buyer customers.[5] VOW brokers have already delivered tens of millions of dollars in financial benefits directly to their customers. Another study conducted in connection with this case revealed evidence consistent with a finding that the growth of a VOW broker that offered discounts led a sizeable traditional competitor to reduce its commissions to consumers.

Innovative brokers with VOWs have enhanced the consumer experience by offering tools and information that allow consumers to approach the purchase of a home well informed about all aspects of the markets they are considering. VOW brokers not only provide their customers access to up-to-date MLS listings information, but also offer mapping and property-comparison tools and provide school district information, crime statistics, and other neighborhood information for consumers to consider as they educate themselves regarding the most important purchase in the lives of most Americans. Many VOW brokers

[1] See *United States* v. *NAR*, No. 05–C–5140, 2006–2 Trade Cas. ¶75,499, 2006 WL 3434263, at *12.14 (ND. Ill. Nov. 27, 2006).

[2] *Id.* at *6–11 & 15.

[3] The real estate licensing laws of most states allow real estate professionals to be licensed as either brokers or as agents or sales associates. To offer real estate brokerage services, a person licensed as an agent or sales associate must affiliate with and be subject to the supervision of a person who holds a broker's license. See, e.g., 225 ILCS 454/1–5.

[4] As the court found in *Austin Board of Realtors* v. *E-Realty, Inc.*, No. 00–CA–154, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000), ''all * * * methods of distribution'' of listings, including the Internet, ''are equivalent'' and should be treated equally under MLS rules. Until it began developing its VOW Policy, NAR agreed with this position. For instance, on January 29, 2001, a top NAR official stated in a letter to the president of eRealty (a VOW broker) that eRealty's distribution of MLS listings through its VOW was ''in compliance with'' MLS rules governing the provision of MLS listings to prospective buyers. NAR also published a white paper in December 2001 in which it described VOWs as an ''emerging, authorized use of MLS current listing data,'' and stated that brokers using VOWs are subject to the same MLS rules governing the dissemination of listings to potential buyers that are applicable to all other brokers. The same official reiterated the point in a March 8, 2002, interview, stating that NAR's rules ''don't discriminate between methods of delivery.''

[5] Prospective buyers frequently do not enter contractual relationships with the broker from whom they receive brokerage services and, as such, are considered ''customers,'' rather than ''clients,'' of the broker.

also allow customers to maintain a personal portfolio of properties they are monitoring, with the VOWs automatically updating those listings as their price or status changes.

Of course, many traditional brokers provide neighborhood and other similar information to their customers, and some even provide such information on Internet websites. VOWs can differ, however, in the quantity and quality of information that they provide. VOW brokers offer their customers complete and up-to-date information and often focus on information most valuable to prospective buyers, identifying price reductions and the number of days a property has been on the market and providing information about comparable recent sales. Customers of VOW brokers can obtain information at their own pace, on their own time, and in the form in which they are most interested in receiving it.

Some VOW brokers have established brokerage businesses that focus solely on the high technology aspects of brokerage services that can be delivered over the Internet. Like other VOW brokers, these ''referral VOWs'' educate prospective buyers about the market in which they are considering a purchase by providing buyers MLS listings and other information on a VOW. When the buyer is ready to tour a home, the referral VOW broker can direct the buyer to brokers or agents who specialize in guiding the buyer on tours of homes and advising them during the negotiating, contracting, and closing process. In some instances, referral VOW brokers have obtained a referral fee (contingent on closing) for delivering educated buyer customers to the brokers or agents who received the referrals. Some referral VOW brokers have offered Commission rebates or other financial benefits to their customers.

*B. Description of the Defendant and Its Activities*

Chicago-based NAR is a trade association that establishes and enforces policies and professional standards for its over one million real estate professional members and 1,400 local and state Boards or Associations of Realtors® (''Member Boards''). NAR promulgates rules governing the operation of the approximately 800 MLSs that are affiliated with NAR through their ownership or operation by NAR's Member Boards.[6] In order to encourage adherence to its policies, NAR can deny coverage under its errors and omissions insurance (i.e., professional liability insurance) policy to any Member Board that maintains MLS rules not in compliance with NAR's policies.

MLSs are joint ventures among virtually all real estate brokers operating in local or regional areas.[7] NAR's MLS rules require its members to submit to the MLS, generally within two to three days of obtaining a listing, information about each property listed for sale through a broker member. By doing so, the broker promotes his or her seller client's listing to all other brokers in the MLS, who can provide information about the listing to their buyer customers. Listing brokers create incentives for other MLS members to try to find buyers for their listed properties by submitting with each new listing an ''offer of cooperation and compensation,'' identifying the amount (usually specified as a percentage of the listing broker's commission) that the listing broker will pay to any other broker who finds a buyer for the property.

Brokers regard participation in their local MLS to be critical to their ability to compete with other brokers for home sellers and buyers. By participating in the MLS, brokers can promise their seller clients that the information about the seller's property can be immediately made available to virtually all other brokers in the area. Brokers who work with buyers can likewise promise their buyer customers access to the widest possible array of properties listed for sale through brokers. An MLS is thus a market-wide joint venture of competitors that possesses substantial market power: To compete successfully, a broker must be a member; and to be a member, a broker must adhere to any restrictions that the MLS imposes.

*C. Description of the Alleged Violation*

1. The Challenged Policies

NAR's Challenged Policies discriminate against and restrain competition from brokers who use VOWs. In its Challenged Policies, NAR denied VOW brokers the ability to use their VOWs to provide customers access to the same MLS listings that the customer could obtain from all other brokers by other delivery methods. NAR did so by allowing a listing broker to ''opt out'' and keep his or her client's listings form being displayed on a competitor's VOW.

On May 17, 2003, NAR adopted its ''VOW Policy.'' As the Amended Complaint alleges, the VOW Policy, most significantly, allowed brokers to opt out of VOWs, withholding their seller-clients' listings from display on VOWs. The opt-out provisions discriminated against VOW brokers because NAR's rules do not otherwise permit one broker to dictate how competitors can convey his or her listings to customers. The VOW Policy permitted opt out either against all VOW brokers (''blanket'') or against a particular VOW broker (''selective'').

The Amended Complaint also alleges that the VOW Policy's ''anti-referral'' rule restrained competition by prohibiting VOW brokers from receiving any payment for referring prospective buyer customers to other brokers. The prospect that brokers could use VOWs to support referral-based businesses was a source of industry antipathy to VOWs, and NAR's rules singled out VOW brokers for a ban on referring customers for a fee.

NAR's VOW Policy, as alleged in the Amended Complaint, also restrained competition from VOW brokers by prohibiting them from selling advertising on pages of their VOWs on which the VOW broker displayed any listings, and by permitting MLSs to degrade the data they provide to VOWs, thus preventing the use of popular technological features offered by many VOW brokers.

[6] There are approximately 1,000 MLSs in the United States, approximately 800 of which are affiliated with NAR and subject to NAR's rules. The rules of the remaining approximately 200 MLSs are not at issue in this lawsuit, although, as a practical matter, many MLSs that are not affiliated with NAR adopt rules that conform substantially to NAR's. Some non-NAR MLSs, such as the MLS serving the Columbia, South Carolina, area and the MLS serving the Hilton Head, South Carolina, area, adopted and maintained rules that have been the subject of antitrust enforcement. On May 2, 2008, the United States brought an antitrust action against the MLS in Columbia alleging that its rules restrain competition among real estate brokers in that area and likely harm consumers. See Complaint in *United States* v. *Consolidated Multiple Listing Service, Inc.*, No 3:08–cv–01786–SB (D.S.C. May 2, 2008), available at *http://www.usdoj.gov/atr/cases/f232800/232803.htm.* The United States challenged similar allegedly anticompetitive rules imposed by the MLS in Hilton Head, South Carolina, also not affiliated with NAR. See Complaint in *United States* v. *Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07–cv–03435–SB (D.S.C. Oct. 16, 2007), available at *http://www.usdoj.gov/atr/cases/t226800/226869.htm.* The MLS in Hilton Head agreed to settle the case by repealing the challenged rules and agreeing to other conduct restrictions, and the court entered the Final Judgment in the case of May 28, 2008. See Final Judgment in *United States* v. *Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07–cv–03435–SB (D.S.C, May 28, 2008), available at *http://www.usdoj.gov/atr/cases/f233900/233901.htm.*

[7] Many MLSs draw brokers and their listed properties from a single local community. Others are substantially larger, with some covering entire states and others—such as Metropolitan Regional Information Systems, Inc., which serves the District of Columbia, and parts of the states of Maryland, Virginia, West Virginia, and Pennsylvania-serving multi-state regions. As the Amended Complaint alleges, the relevant geographic markets in which brokers compete are local and normally no larger than the service area of the MLS or MLSs in which they participate.

NAR repealed its VOW Policy and replaced it with its ILD Policy on September 8, 2005, the day the United States filed its initial Complaint. As alleged in the Amended Complaint, NAR's ILD Policy continued to discriminate against VOW brokers by permitting their competitors a blanket opt out where they could withhold their listings from display on all VOWs.[8] Although the ILD Policy did not include an explicit anti-referral rule, NAR revised and reinterpreted its rule on MLS membership to prevent brokers who operate referral VOWs from becoming members of the MLS and obtaining access to MLS listings. The Amended Complaint also alleges that the ILD Policy continued to permit MLSs to downgrade the data they provide to VOWs and to restrict VOW brokers' co-branding or advertising relationships with third parties.

2. Effects of the Challenged Policies

As discussed above, NAR's rules permit brokers to show prospective buyers all MLS listings in which the buyers might have an interest. For most brokers, this means that they can respond to a request from a buyer customer by delivering responsive listings by whatever delivery method the broker and customer choose. NAR's opt-out provisions deny this right only if the method of delivery selected by the broker and the customer is a VOW. Thus, NAR's rules restrain VOW-operating brokers from competing in a way that is efficient and desired by many customers.

Even if no broker uses the opt-out device, its existence renders a VOW broker unable to promise customers access to all relevant MLS listings, materially disadvantaging brokers who use a VOW to compete. When opt out occurs, a VOW broker is further disadvantaged because it cannot deliver complete MLS listings to customers through its VOW. Finally, with the threat of opt outs constantly hanging over it, any VOW broker contemplating a pro-consumer initiative would have to weigh the prospect of an angry response from its incumbent competitors.

Opt outs were an empirical reality. Although the United States' investigation became public just a few months after NAR adopted its VOW Policy, the United States discovered over fifty instances of broker opt outs under a wide variety of circumstances in fourteen diverse markets. Brokers opted out of VOWs in large markets (e.g., Detroit and Cleveland), medium markets (e.g., Des Moines), and small markets (e.g., Emporia (Kansas), Hays (Kansas), and York (Pennsylvania)). In some markets (Emporia and Hays), virtually all brokers opted out. In others, only one or a few opted out (e.g., Detroit, York, Maine). Opt outs occurred in a market with one dominant broker (Des Moines), in markets with only a small number of broker competitors (Emporia and Hays), and in markets with hundreds of brokers (Detroit). In some markets (e.g., Des Moines, Detroit, Cleveland, York, and Jackson (Wyoming)), large brokers opted out. In others (e.g., Marathon (Florida) and Hudson (New York)), only relatively small brokers opted out. Brokers opted out in markets in which price competition is highly restricted by the state (Kansas, which prohibits brokers from providing commission rebates to home buyers), as well as in markets in which the state does not restrict such price competition (Michigan). Opt outs occurred in circumstances that imply they were independent business decisions by the opting-out brokers (e.g., Detroit) and in circumstances in which opt-out forms were filled out by almost all brokers in the same room at the same lime (Emporia).

NAR's Challenged Policies also obstruct the operation of referral VOWs. NAR's VOW Policy prohibited referral fees explicitly and directly. NAR's 2005 modification to the requirements of MLS membership denied MLS membership and—of greatest significance to a referral VOW access to MLS data to any broker whose business focused exclusively on educating customers on a VOW and referring those customers to other brokers to receive other in-person brokerage services. Each of these policies prevents two brokers from working together in an innovative and efficient way, with a VOW broker attracting new business and educating potential buyers about the market, and the other broker guiding the buyer through home tours and the negotiating, contracting, and closing process.

As discussed above, NAR's Challenged Policies also permit MLSs to downgrade the MLS data feed provided to VOW brokers, which limits the consumer-friendly features VOW brokers could provide through their VOWs. The Challenged Policies also allow MLSs to prohibit VOW brokers from establishing some advertising or co-branding relationships with third parties, limiting the freedom of VOW brokers to operate their businesses as they desire and enabling MLSs (which are controlled by a VOW broker's competitors) to micromanage the appearance of brokers' VOWs.

3. The Challenged Policies Violate the Antitrust Laws

NAR's Challenged Policies violate Section 1 of the Sherman Act, which prohibits unreasonable restraints on competition. The Challenged Policies were the product of an agreement among a group of competitors (the members of NAR) mandating how brokers could use VOWs to compete and unreasonably restraining competition from VOW brokers. Competition from VOW brokers had posed a threat to the established order in the real estate industry. Yet it was clear from prior litigation that antitrust law would not allow incumbent brokers simply to prevent VOW brokers from providing any listings to customers through their VOWs. See *Austin Board of Realtors* v. *e-Realty, Inc.*, No. 00–CA–154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000). Instead, NAR's Challenged Policies restrained competition from VOW brokers by denying them full access to MLS listings and restricting how VOW brokers could do business.

While an MLS, like other joint ventures with market power, can have reasonable membership restrictions related to a legitimate, procompetitive purpose, it cannot create rules that unreasonably impede competition among brokers and harm consumers. See *United States* v. *Realty Multi-List*, 629 F.2d 1351, 1371 (5th Cir. 1980). NAR's Challenged Policies restrain competition because they dictate how the MLS's broker-members could compete—specifically, restricting how they could compete using a VOW. See Id. at 1383–85 (finding MLS rule precluding part-time brokerage to be unlawful); *Cantor* v. *Multiple Listing Serv. of Dutchess County. Inc.*, 568 F. Supp. 424, 430–31 (S.D.N.Y. 1983) (finding that MLS yard sign restriction violated Section 1 of the Sherman Act because it ''substantially impair[ed] [the plaintiffs'] freedom to conduct their businesses as they see fit'' and ''vitiated any competitive advantage which plaintiffs endeavored to obtain'' through association with a national franchisor); see also *National Soc'y of Prof'l Eng'rs*, 435 U.S. 679,695 (1978) (condemning trade association ban on competitive bidding by members). Similarly, NAR's Challenged Policies restrain competition because they impede the operations of a particularly efficient class of competitors: VOW brokers. See *Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir, 1993) (upholding verdict against railroads that ''block[ed] the entry of low cost

[8] NAR did delete from its ILD Policy its rule allowing brokers to selectively opt out against particular VOW brokers.

competitors''); see also *RE/MAX* v. *Realty One, Inc.*, 173 F.3d 995, 1014 (6th Cir. 1999) (upholding Sherman Act § 1 claim where competitors ''impose[d] additional costs'' on innovative entrant). NAR's Challenged Policies also restrain competition by denying consumers the full MLS listings information (including valuable information such as sold data and data fields such as days on market) that consumers want. See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 457, 462 (1986) (''The Federation's collective activities resulted in the denial of the information the customers requested in the form they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. * * * The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.'')

Moreover, NAR's Challenged Policies constitute an unreasonable restraint on competition because they produced no procompetitive benefits that justified the restraints. Although NAR claimed that the Challenged Policies were essential to the continued existence of MLSs, those MLSs without the Challenged Policies functioned just as well without them. Given the market power of the MLS, brokers believe it would amount to economic suicide for them to leave the MLS.

*D. Harm From the Alleged Violation*

Taken together, NAR's Challenged Policies obstruct innovative brokers' use of efficient, Internet-based tools to provide brokerage services to customers and clients. The Challenged Policies inhibit VOW brokers from achieving the operating efficiencies that VOWs can make available and likely diminish the high-quality and low-priced services offered to consumers by VOW brokers. The result is that the Challenged Policies, products of agreements among competitor brokers, likely would deter, delay, or prevent the benefits of innovation and competition from reaching consumers, and thus violate Section 1 of the Sherman Act, 15 U.S.C. 1.

## III. Explanation of the Proposed Final Judgment

The proposed Final Judgment embodies the fundamental principle that an association of competing brokers, operating an MLS, cannot use the aggregated power of the MLS to discriminate against a particular method of competition (in this case, VOWs). The proposed Final Judgment will end the competitive harm resulting from NAR's Challenged Policies and will allow consumers to benefit from the enhanced competition that VOW brokers can provide. The proposed Final Judgment requires NAR to repeal its VOW and ILD Policies and to replace them with a ''Modified VOW Policy'' (attached to the proposed Final Judgment as Exhibit A) that makes it clear that brokers can operate VOWs without interference from their rivals.[9] With respect to any issues concerning the operation of VOWs that are not explicitly addressed by the Modified VOW Policy, the proposed Final Judgment's general nondiscrimination provisions apply.[10]

The Modified VOW Policy does not allow brokers to opt out and withhold their clients' listings from VOW brokers.[11] This change eliminates entirely the most egregious impediment to VOWs that was contained in the Challenged Policies.[12] Under the Modified VOW Policy, the MLS must provide to a VOW broker for display on the VOW all MLS listings information that brokers are permitted to provide to customers by all other methods of delivery.[13]

The Modified VOW Policy that NAR must adopt under the proposed Final Judgment also permits brokers to operate referral VOWs. It expressly prohibits MLSs from impeding VOW brokers from referring customers to other brokers for compensation.[14] It also provides two avenues by which a broker desiring to serve customers through a referral VOW may do so: As an ''Affiliated VOW Partner'' (''AVP'') and as a member who directly serves some customers.

Under the Modified VOW Policy, a broker who desires to operate a referral business can partner as an AVP with a network of brokers and agents to whom the AVP will ultimately refer educated buyer customers who are ready to tour homes and receive in-person brokerage services.[15] The Modified VOW Policy requires MLSs to provide complete MLS listings information to any broker designated by another broker to be an AVP that will operate a VOW on the designating broker's behalf.[16] The MLS must provide listings information to the AVP on the same terms and conditions on which the MLS would provide listings to the broker who designated the AVP to operate the VOW.[17] This provision will allow referral VOWs to partner with brokers or agents, obtain access to MLS data to operate their referral VOWs, and provide the efficiencies that come from operating a

[9] See proposed Final Judgment, ¶¶ V.A–V.D. Under the Modified VOW Policy, with the consent of their supervising broker, agents and sales associates are also expressly permitted to operate VOWs. Brokers cannot agree, by MLS rule or otherwise, to ban VOWs operated by agents or sales associates. See Modified VOW Policy, ¶ I.1.b.

[10] See proposed Final Judgment, ¶¶ IV.A, IV.B, & IV.C; see also id., ¶ V.F (requiring NAR to deny insurance coverage to any Member Board that maintains rules at odds with ¶ IV of the proposed Final Judgment).

[11] See Modified VOW Policy, ¶ I.4.

[12] The Modified VOW Policy does allow an individual home seller to direct that information about his or her own home not appear on any Internet Web sites, id., ¶ II.5.a, recognizing the legitimate interests of a seller to protect his or her privacy and not to expose information about his or her property or the fact that it is on the market to the public on the Internet. It also allows a home seller to request that a VOW broker who permits customers to provide written reviews of properties disable that feature as to the seller's listing. Id., ¶ II.5.c. Such comments—which can be anonymous—have no exact analogue in the bricks-and-mortar world. Unlike books, music, or other consumer goods, reviews of which can provide useful information to other potential purchasers of the same items, the uniqueness of each individual home creates an opportunity for an interested buyer (or his or her broker) to attempt to manipulate the market by providing a negative review in hopes of deterring other buyers from visiting or making an offer on the home. An individual home seller is also permitted under the Modified VOW Policy to request that an automated home valuation feature provided by a VOW broker be disabled as to the seller's individual property, although the VOW broker is permitted to state on the VOW that the seller requested that this type of information not be presented on the VOW about his or her property. See id. Though such valuations might be provided in a bricks-and-mortar environment, they would not likely be provided without evaluation, comment, or input from an agent or sales associate. The Modified VOW Policy also provides a mechanism for sellers to correct any false information about their property that a VOW adds, Id., ¶ II.5.d, consistent with the general responsibility of any broker (VOW or otherwise) to present accurate information.

[13] See Id., ¶ III.2. The information that MLSs must provide to VOW brokers for display on their VOWs includes information about properties that have sold (except in areas where the actual sales prices of homes is not accessible from public records) and all other information that brokers can provide to customers by any method, including by oral communications. Id.

[14] Id., ¶ III.11.

[15] Nothing in the Modified VOW Policy requires an AVP to hold a broker's license. An unlicensed technology company would be permitted under the Modified VOW Policy to host a VOW for a broker or brokers (or for one or more agents or sales associates, with the consent of their supervising brokers). When a licensed broker operates VOWs as an AVP in conjunction with other brokers (or their agents or sales associates), the AVP can perform services for which a broker's license may be required, including answering questions for customers who register on the VOW and referring customers to the brokers and agents or sales associates for whom the AVP operates the VOWs. See, e.g., 225 ILCS 454/1–10 (describing the activities for which a broker's license is required in Illinois, including ''assist[ing] or direct[ing] in procuring or referring of prospects'').

[16] Modified VOW Policy, ¶¶ I.1.a & III.10. An AVP's rights to obtain listings information from the MLS is derivative of the rights of the brokers for whom the AVP is operating VOWs. Id., ¶ III.10. The AVP would not itself be an MLS member entitled to MLS access directly.

[17] Id., ¶ III.10.

VOW to the brokers and agents with whom they partner.

Under the proposed Final Judgment, a broker who works directly with some buyers and sellers, but who also wants to operate a VOW and focus on referrals, can become a member of the MLS and use MLS data as a member, including for its referral VOW. The Final Judgment permits NAR's Member Boards to implement the new requirements for MLS membership that NAR originally adopted with its ILD Policy,[18] but an interpretive Note (see Exhibit B to the proposed Final Judgment) explains that the new membership rule is not to be interpreted to restrain VOW competition.[19]

Finally, the Modified VOW Policy prohibits MLSs from using an inferior data delivery method to provide MLS listings to VOW brokers [20] and from unreasonably restricting the advertising and co-branding relationships VOW brokers establish with third parties.[21] VOW brokers, under the Modified VOW Policy, will be free from MLS interference in the appearance and features of their VOWs.[22]

NAR is required by the Final Judgment to direct its Member Boards to adopt rules implementing the Modified VOW Policy within ninety days of this Court's entry of the Final Judgment.[23] To ensure that its Member Boards adopt, maintain, and enforce rules implementing the Modified VOW Policy, NAR is required to deny errors and omissions insurance coverage to any Member Board that refuses to do so and forward to the United States any complaints it receives concerning the failure of any Member Board (or any MLS owned or operated by any Member Board) to abide by or enforce those rules.[24] The proposed Final Judgment also broadly prohibits NAR from adopting any other rules that impede the operation of VOWs or that discriminate against VOW brokers in the operation of their VOWs.[25]

[18] Proposed Final Judgment, ¶ VI.A.

[19] Under the interpretative Note included in Exhibit B to the proposed Final Judgment, if a VOW broker actively endeavors to obtain some seller clients for whom it will market properties or some buyer customers to whom it will offer in-person brokerage services, that VOW broker will be permitted to operate a referral VOW and refer to other brokers the educated customers he or she does not serve directly.

[20] See Modified VOW Policy, ¶ III.2 (''For purposes of this Policy, 'downloading' means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis'' (emphasis added)).

[21] See Id., ¶ III.7.

[22] See Id., ¶ III.8 & III.9.

[23] Proposed Final Judgment, ¶ V.D.

[24] Id., ¶¶ V.E & V.H.

[25] Id., ¶¶ IV.A & IV.B.

Finally, the proposed Final Judgment, applicable for ten years after its entry by this Court,[26] establishes an antitrust compliance program under which NAR is required to review its Member Board's rules for compliance with the proposed Final Judgment, to provide materials to its Member Boards that explain the proposed Final Judgment and the Modified VOW Policy, and to hold an annual program for its Member Boards and their counsel discussing the proposed Final Judgment and the antitrust laws.[27] The proposed Final Judgment expressly places no limitation on the United States' ability to investigate or bring an antitrust enforcement action in the future to prevent harm to competition caused by any rule adopted or enforced by NAR or any of its Member Boards.[28]

## IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against NAR.

## V. Procedures Available for Modification of the Proposed Final Judgment

The United States and NAR have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will he considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John R. Read, Chief, Litigation III Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW.; Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.[29]

## VI. Alternatives to the Proposed Amended Final Judgment

At several points during the litigation, the United States received from defendant NAR proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals arid suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, proceeding with the full trial on the merits against NAR that was scheduled to commence on July 7, 2008. The United States is satisfied that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure that consumers can benefit from the enhanced brokerage service competition brought by VOW brokers as effectively as any remedy the United States likely would have obtained after a successful trial.

## VII. Standard of Review Under the APPA for Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(l). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies

[26] Id., ¶ X.

[27] Id., ¶ V.G.

[28] Id., ¶ IX.

[29] Proposed Final Judgment, ¶ VIII.

actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d I (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[30]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37,40 (D.D.C. 2001). Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel,* 648 F.2d at 666 (emphasis added) (citations omitted).[31] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' SBC' Commc'ns, 489 F. Supp. 2d at 17; see also Microsoft, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States,* 460 U.S. 1001 (1983); see also *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the courts role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' Microsoft, 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. Id. at 1459–60. As the United States District Court for the District of Columbia recently confirmed in SBC communications, courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' SBC Commc'ns, 489 F. Supp. 2d at 11.[32]

[30] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. (Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(l) (2006); see also SBC Commc'ns, 489 F. Supp. 2d at II (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[31] Cf. BNS, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). See generally Microsoft, 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

[32] See *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid–Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6(1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

**VIII. Determinative Documents**

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,
s/David C. Kully

Craig W. Conrath,
David C. Kully,
*U.S. Department of Justice,*
*Antitrust Division,*
*450 5th Street, NW.; Suite 4000,*
*Washington, DC 20530,*
*Tel: (202) 307–5779,*
*Fax: (202) 307–9952.*

Dated: June 12, 2008

**Certificate of Service**

I, David C. Kully, hereby certify that on this 12th day of June, 2008, I caused a copy of the foregoing Competitive Impact Statement to be served by ECF on counsel for the defendant identified below. Jack R. Bierig, Sidley Austin LLP, One South Dearborn Street, Chicago, IL 60603, (312) 853–7000, *jbierig@sidley.com.*

s/David C. Kully

David C. Kully

[FR Doc. E8–17800 Filed 8–13–08; 8:45 am]
**BILLING CODE 4410–11–M**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

August 11, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *king.darrin@dol.gov.*

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employee Benefits Security Administration (EBSA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

*Agency:* Employee Benefits Security Administration.

*Type of Review:* Extension without change of currently approved collection.

*Title of Collection:* Prohibited Transaction Exemption 86–128.

*OMB Control Number:* 1210–0059.

*Affected Public:* Private Sector—Business or other for-profits and not-for-profit institutions.

*Total Estimated Number of Respondents:* 23,673.

*Total Estimated Annual Burden Hours:* 59,072.

*Total Estimated Annual Costs Burden:* $711,630.

*Description:* Prohibited Transaction Class Exemption 86–128 permits persons who serve as fiduciaries for employee benefit plans to effect or execute securities transactions on behalf of employee benefit plans. The exemption also allows sponsors of pooled separate accounts and other pooled investment funds to use their affiliates to effect or execute securities transactions for such accounts in order to recapture brokerage commissions for benefit of employee benefit plans whose assets are maintained in pooled separate accounts managed by the insurance companies. For additional information, see related notice published at 73 FRN 21987 on April 23, 2008.

**Darrin A. King,**

*Departmental Clearance Officer.*

[FR Doc. E8–18842 Filed 8–13–08; 8:45 am]
**BILLING CODE 4510–29–P**

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors

**TIME AND DATE:** The Legal Services Corporation Board of Directors will meet on August 18, 2008 via conference call. The meeting will begin at 3:30 p.m. EDT and continue until conclusion of the Board's agenda.

**LOCATION:** 3333 K Street, NW., Washington, DC 20007, 3rd Floor Conference Center.

**STATUS OF MEETING:** Open. Directors will participate by telephone conference in such a manner as to enable interested members of the public to hear and identify all persons participating in the meeting. Members of the public wishing to observe the meeting may do so by joining participating staff at the location indicated above. Members of the public wishing to listen to the meeting by telephone should call 1–888–390–3110 and enter 10850 on the key pad when prompted. To enhance the quality of your listening experience, as well as that of others, and to eliminate background noises that interfere with the audio recording of the proceeding, please mute your telephone during the meeting.

**MATTERS TO BE CONSIDERED:**

1. Consider and act on adoption of agenda
2. Consider and act on whether to authorize the transfer or reprogramming of LSC's FY 2008 Loan Repayment Assistance Program (LRAP) funds to LSC's FY 2009 Management and Administration budget [1]
   a. Staff Report
   b. Public Comment
3. Consider and act on other business
4. Consider and act on motion to adjourn the meeting

**CONTACT PERSON FOR INFORMATION:** Patricia Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual

[1] The Board of Directors welcomes public comment on Management's proposal, which will be available to for public inspection at *http://www.lsc.gov/foia2/foia_eprr.php* as of 10 a.m. (EDT) on Wednesday, August 13, 2008.

and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 295–1500.

Dated: August 11, 2008.

**Victor M. Fortuno,**

*Vice President & General Counsel.*

[FR Doc. E8–18866 Filed 8–12–08; 11:15 am]

**BILLING CODE 7050–01–P**

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors; Amended Notice

The Internet link reflected in footnote one has been amended. No other changes have been made to the original notice issued on August 11, 2008.

**TIME AND DATE:** The Legal Services Corporation Board of Directors will meet on August 18, 2008 via conference call. The meeting will begin at 3:30 p.m. EDT and continue until conclusion of the Board's agenda.

**LOCATION:** 3333 K Street, NW., Washington, DC 20007, 3rd Floor Conference Center.

**STATUS OF MEETING:** Open. Directors will participate by telephone conference in such a manner as to enable interested members of the public to hear and identify all persons participating in the meeting. Members of the public wishing to observe the meeting may do so by joining participating staff at the location indicated above. Members of the public wishing to listen to the meeting by telephone should call 1–888–390–3110 and enter 10850 on the key pad when prompted. To enhance the quality of your listening experience, as well as that of others, and to eliminate background noises that interfere with the audio recording of the proceeding, please mute your telephone during the meeting.

**MATTERS TO BE CONSIDERED:**

1. Consider and act on adoption of agenda
2. Consider and act on whether to authorize the transfer or reprogramming of LSC's FY 2008 Loan Repayment Assistance Program (LRAP) funds to LSC's FY 2009 Management and Administration budget [1]
   a. Staff Report
   b. Public Comment
3. Consider and act on other business
4. Consider and act on motion to adjourn the meeting

*Contact Person for Information:* Patricia Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 295–1500.

Dated: August 11, 2008.

**Victor M. Fortuno,**

*Vice President & General Counsel.*

[FR Doc. E8–18883 Filed 8–12–08; 11:15 am]

**BILLING CODE 7050–01–P**

[1] The Board of Directors welcomes public comment on Management's proposal, which will be available to for public inspection at *http://www.lsc.gov/foia2/pdfs/eprr/Board_Memorandum_with_background_on_reprogramming_request.pdf* as of 10 a.m. (EDT) on Wednesday, August 13, 2008.

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Andean Trade Preference Act (ATPA); Notice Regarding the 2008 Annual Review

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice and request for petitions.

**SUMMARY:** This notice announces the 2008 Annual Review of the Andean Trade Preference Act (ATPA). Under this process petitions may be filed calling for the limitation, withdrawal or suspension of ATPA or ATPDEA benefits by presenting evidence that the eligibility criteria of the program are not being met. USTR will publish a list of petitions filed in response to this announcement in the **Federal Register**.

**DATES:** The deadline for the submission of petitions for the 2008 Annual ATPA Review is September 15, 2008.

**ADDRESSES:** Submit petitions by electronic mail (e-mail) to *FR0716@ustr.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Bennett M. Harman, Deputy Assistant U.S. Trade Representative for Latin America, Office of the Americas, Office of the United States Trade Representative, 600 17th St., NW., Washington, DC 20508. The telephone number is (202) 395–9446 and the facsimile number is (202) 395–9675.

**SUPPLEMENTARY INFORMATION:** The ATPA (19 U.S.C. 3201–06), as renewed and amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA) in the Trade Act of 2002 (Pub. L. 107–210) and extended until December 31, 2008 by the Andean Trade Preference Act, (Pub L. 110–42), provides for trade benefits for eligible Andean countries. Consistent with Section 3103(d) of the ATPDEA, USTR promulgated regulations (15 CFR part 2016) (68 FR 43922) regarding the review of eligibility of articles and countries for the benefits of the ATPA, as amended. The 2008 Annual ATPA Review is the fifth such review to be conducted pursuant to the ATPA review regulations. To qualify for the benefits of the ATPA and ATPDEA, each country must meet several eligibility criteria, as set forth in sections 203(c) and (d), and section 204(b)(6)(B) of the ATPA, as amended (19 U.S.C. 3202(c), (d); 19 U.S.C. 3203(b)(6)(B)), and as outlined in the **Federal Register** notice USTR published to request public comments regarding the designation of eligible countries as ATPDEA beneficiary countries (67 FR 53379). Under section 203(e) of the ATPA, as amended (19 U.S.C. 3202(e)), the President may withdraw or suspend the designation of any country as an ATPA or ATPDEA beneficiary country, and may also withdraw, suspend, or limit preferential treatment for any product of any such beneficiary country, if the President determines that, as a result of changed circumstances, the country is not meeting the eligibility criteria.

The ATPA regulations provide the schedule of dates for conducting an annual review, unless otherwise specified by **Federal Register** notice. Notice is hereby given that, in order to be considered in the 2008 Annual ATPA Review, all petitions to withdraw or suspend the designation of a country as an ATPA or ATPDEA beneficiary country, or to withdraw, suspend, or limit application of preferential treatment to any article of any ATPA beneficiary country under the ATPA, or to any article of any ATPDEA beneficiary country under section 204(b)(1), (3), or (4) (19 U.S.C. 3202(b)(1), (3), (4)) of the ATPA, must be received by the Andean Subcommittee of the Trade Policy Staff Committee no later than 5 p.m. EDT on September 15, 2008. Petitioners should consult 15 CFR 2016.0 regarding the content of such petitions.

E-mail submissions should be single copy transmissions in English, and the total submission including attachments should not exceed 50 pages. Submissions should use the following subject line: ''2008 Annual ATPA Review—Petition.'' Documents must be submitted as either WordPerfect (''.WPD''), MSWord (''.DOC''), Adobe (''PDF''), or text (''.TXT'') files. Supporting documentation submitted as spreadsheets are acceptable as Quattro Pro or Excel, pre-formatted for printing on 8 ½ x 11-inch paper. Submissions by e-mail should not include separate

cover letters or messages in the message area of the e-mail; information that might appear in any cover letter should be included directly in the submission. To the extent possible, any data attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Petitions will be available for public inspection by appointment with the staff of the USTR Public Reading Room, except for information granted ''business confidential'' status pursuant to 15 CFR 2003.6. If the submission contains business confidential information that the submitter wishes to protect from public disclosure, the confidential submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of every page of the document. In addition, the submission must be accompanied by a non-confidential version that indicates, with asterisks, where confidential information was redacted or deleted. The top and bottom of each page of the non-confidential version must be marked either ''PUBLIC VERSION'' or ''NON-CONFIDENTIAL''. Business confidential comments that are submitted without the required markings or that are not accompanied by a properly marked non-confidential version as set forth above may not be accepted or may be treated as public documents.

The file name of any document containing business confidential information attached to an e-mail transmission should begin with the characters ''BC-'', and the file name of the public version should begin with the characters ''P-''. The ''P-'' or ''BC-'' should be followed by the name of the person or party submitting the petition. The e-mail address for submissions is *FR0716@ustr.eop.gov*. Public versions of all documents relating to this review will be available for review shortly after the due date by appointment in the USTR Public Reading Room, 1724 F Street, NW., Washington, DC. Availability of documents may be ascertained, and appointments may be made from 9:30 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday, by calling (202) 395–6186.

**Carmen Suro-Bredie,**

*Chairman, Trade Policy Staff Committee.*

[FR Doc. E8–18861 Filed 8–13–08; 8:45 am]

**BILLING CODE 3190–W8–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 28355; 812–13537]**

## Advanced Series Trust, et al.; Notice of Application

August 8, 2008.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from rule 12d1–2(a) under the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit registered open-end management investment companies relying on rule 12d1–2 under the Act to invest in certain financial instruments.

**APPLICANTS:** Advanced Series Trust (the ''AST Trust''), The Prudential Series Fund (the ''PSF Trust'' and, together with the AST Trust, the ''Trusts''), AST Investment Services, Inc. (''AST''), Prudential Investments LLC (''PI''), Prudential Annuities Distributors, Inc. (''PAD''), and Prudential Investment Management Services LLC (''PIMS'').

**FILING DATES:** The application was filed on June 2, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on September 2, 2008 and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o John P. Schwartz, Prudential Investments LLC, Gateway Center Three, 100 Mulberry Street, Fourth Floor, Newark, New Jersey 07102–4061.

**FOR FURTHER INFORMATION CONTACT:** Stephen P. Smith, Research Specialist, at (202) 551–6819 or Julia Kim Gilmer, Branch Chief, at (202) 551–6871 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520 (telephone (202) 551–5850).

### Applicants' Representations

1. The AST Trust is organized as a Massachusetts business trust and the PSF Trust is organized as a Delaware statutory trust. The Trusts are registered under the Act as open-end management investment companies. Applicants request the exemption to the extent necessary to permit any existing or future registered open-end management investment company or series thereof advised by AST or PI or an entity controlling, controlled by, or under common control with AST or PI and which invests in other registered open-end management investment companies in reliance on section 12(d)(1)(G) of the Act, and which is also eligible to invest in securities (as defined in section 2(a)(36) of the Act) in reliance on rule 12d1–2 under the Act (together with the Trusts and their series, the ''Applicant Funds''), to also invest, to the extent consistent with its investment objective, policies, strategies and limitations, in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act (''Other Investments'').

2. AST and PI serve as the investment advisers for the Applicant Funds that are organized as series of the AST Trust, while PI serves as the sole investment adviser for the Applicant Funds that are organized as series of the PSF Trust. AST is organized as a Connecticut corporation while PI is organized as a New York limited liability company. Each of AST and PI is a wholly owned, indirect subsidiary of Prudential Financial Inc. and a registered investment adviser under the Investment Advisers Act of 1940, as amended. PAD, a Delaware corporation, and PIMS, a Delaware limited liability company, each a registered broker-dealer under the Securities Exchange Act of 1934, as amended (the ''Exchange Act''), serve as co-distributors for the AST Trust. PIMS serves as the sole distributor for the PSF Trust.

3. Consistent with its fiduciary obligations under the Act, each Applicant Fund's board of trustees will review the advisory fees charged by the Applicant Fund's investment adviser to ensure that they are based on services

provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Applicant Fund may invest.

**Applicants' Legal Analysis**

1. Section 12(d)(1)(A) of the Act provides that no registered investment company (''acquiring company'') may acquire securities of another investment company (''acquired company'') if such securities represent more than 3% of the acquired company's outstanding voting stock or more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquired company and acquiring company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Exchange Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

3. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered unit investment trust that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government securities, and short-term paper: (i) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (ii) securities (other than securities issued by an investment company); and (iii) securities issued by a money market fund, when the investment is made in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, ''securities'' means any security as that term is defined in section 2(a)(36) of the Act.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of the Act, or from any rule under the Act, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

5. The Applicants state that the proposed arrangement would comply with the provisions of rule 12d1–2 under the Act, but for the fact that the Applicant Funds may invest a portion of their assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Applicant Funds to invest in Other Investments. The Applicants state that permitting the Applicant Funds to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) of the Act were designed to address.

**Applicants' Condition**

The Applicants agree that any order granting the requested relief will be subject to the following condition:

Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2), to the extent that it restricts any Applicant Fund from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, under delegated authority.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–18802 Filed 8–13–08; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. IC–28354; File No. 812–13532]**

## Prudential Annuities Life Assurance Corporation, et al.; Notice of Application

August 8, 2008

**AGENCY:** Securities and Exchange Commission (''SEC'' or ''Commission'').

**ACTION:** Notice of application for an order under Section 6(c) of the Investment Company Act of 1940, as amended (the ''1940 Act'') granting exemptions from the provisions of Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c–1 thereunder.

**APPLICANTS:** Prudential Annuities Life Assurance Corporation (''PALAC''), Prudential Annuities Life Assurance Corporation Variable Account B (''Account''), and Prudential Annuities Distributors, Inc. (''PAD,'' and collectively with PALAC, and the Account, the ''Applicants'').

**SUMMARY OF APPLICATION:** Applicants seek an order under Section 6(c) of the 1940 Act to the extent necessary to permit, under specified circumstances, the recapture of credits applied to purchase payments made under the Advanced Series XTra Credit Eight variable annuity contract (''Contract''), as well as other contracts that PALAC may issue in the future through the Account or any other separate account established in the future by PALAC that support variable annuity contracts that are substantially similar in all material respects to the Contract.

**FILING DATE:** The application was filed on May 7, 2008 and amended on July 15, 2008.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on September 2, 2008, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, SEC, 100 F Street, NE., Washington, DC 20549–1090. Applicants, c/o C. Christopher Sprague, Esq., The Prudential Insurance Company of America, 751 Broad Street, Newark, NJ 07102–2992.

**FOR FURTHER INFORMATION CONTACT:** Michelle Roberts, Staff Attorney, or Joyce M. Pickholz, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 100 F Street, NE., Washington, DC 20549–1090 (tel. (202) 551–8090).

**Applicants' Representations**

1. The Contract [1] is a ''bonus annuity'' that offers a credit of up to 8% of purchase payments (''Contract Credits''). Applicants propose to recapture the Contract Credits under the following circumstances: (a) If the Contract is returned during the free look period, (b) if the Contract Credit was applied within 12 months prior to death (except that PALAC will not recapture the Contract Credit to the extent that the death benefit is equal to the account value, but after the recovery of all or a portion of the Contract Credit, the death benefit would be equal to less than purchase payments minus proportional withdrawals), and (c) if the Contract Credit was applied within 12 months prior to the exercise of the medically-related surrender of the Annuity.

2. Applicants seek an order pursuant to Section 6(c) of the 1940 Act exempting them from Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the 1940 Act and Rule 22c–1 thereunder to the extent necessary to permit PALAC to recapture the Contract Credits under the scenarios described above. Applicants request that the order apply to any separate account established in the future by PALAC (''Future Account'') that supports variable annuity contracts offered by PALAC in the future that are substantially similar in all material respects to the Contract (''Future Contracts''). Applicants also request that the order extend to any FINRA member broker-dealer controlling, controlled by, or under common control with PALAC, whether existing or created in the future, that serves as a distributor or principal underwriter of the Contract offered through the Account or any Future Account (''Broker-Dealers''). Applicants also request that the order extend to any broker-dealers that are FINRA-registered and not affiliated with PALAC or the Broker-Dealers (the ''Unaffiliated Broker-Dealers''). Each Unaffiliated Broker-Dealer will have entered into a dealer agreement with PAD or an affiliate of PAD prior to offering the Contract.

3. The Contract is a flexible premium deferred variable annuity contracts that is registered on Form N–4 (file no. 333–150220). The minimum initial purchase payment is $10,000, and any additional purchase payment must be at least $100 (except for contract owners who participate in certain periodic purchase payment programs). The maximum issue age for the Contract is 75, meaning that (a) the owner must be 75 or younger, or (b) for a Contract that is entity-owned, the annuitant must be 75 or younger.

4. There are various insurance features under the Contract and charges associated with those features. There is a mortality and expense risk charge equal to 1.60% annually, and an administration charge equal to 0.15% annually. There is a maintenance fee equal to the lesser of $35 or 2% of account value, which is assessed annually on the Contract's anniversary date or upon surrender. PALAC imposes no fee with respect to the first 20 transfers in an annuity year, but after the 20th such transfer, currently imposes a fee of $10 per transfer ($15 maximum). There is a contingent deferred sales charge (''CDSC'') under the Contract, the amount of which is based on the number of years that have elapsed since the issue date of the annuity. The CDSC begins at 9% in year one, and each year thereafter is equal, respectively, to 9%, 8%, 7%, 6%, 5%, 4%, 3%, 2%, 1%, with no CDSC in years 11 and later. No CDSC is imposed on the portion of a withdrawal that can be taken as part of the free withdrawal feature of the Contract. The maximum free withdrawal amount available in each annuity year is equal to 10% of all purchase payments that are subject to a CDSC. Earnings are not subject to any CDSC, and thus are not considered part of the free withdrawal. No CDSC is imposed in any situation in which Applicants recapture a Contract Credit.

5. A Contract owner may select one or more of several optional living benefits. The Guaranteed Minimum Income Benefit, which offers lifetime payments based on a guaranteed protected value, is subject to a charge of 0.50% per year of the average protected income value each year. The Lifetime Five Income Benefit (which allows the owner to withdraw a specified protected value through periodic withdrawals or as a series of payments for life) is subject to a charge of 0.60% annually of the average daily net assets in the sub-accounts. The Contract also offers a variant of the Lifetime Five benefit (called ''Spousal Lifetime Five'') that, for a charge of 0.75% annually, guarantees income until the second-to-die of two individuals married to each other. There is yet another variant called Highest Daily Lifetime Five, under which the protected withdrawal value is based on a highest daily account value and which bears a charge of 0.60% annually. There are other lifetime withdrawal benefits called Highest Daily Lifetime Seven, Spousal Highest Daily Lifetime Seven, Highest Daily Lifetime Seven with Beneficiary Income Option, Spousal Highest Daily Lifetime Seven with Beneficiary Income Option, and Highest Daily Lifetime Seven with Lifetime Income Accelerator. The charges for these benefits range from 0.60% to 0.95% of the Protected Withdrawal Value under the benefit. The Contract offers two guaranteed minimum accumulation benefits, called the Guaranteed Return Option Plus 2008 and Highest Daily Guaranteed Return Option, for which PALAC imposes a charge equal to 0.35% annually, applied against the account value in the sub-accounts. Finally, the Contract offers a guaranteed minimum withdrawal benefit for a charge of 0.35% annually, applied against the account value in the sub-accounts.

6. The Contract offers several optional death benefits, including the Enhanced Beneficiary Protection Death Benefit for a charge of 0.25% annually, the Highest Anniversary Value Death Benefit for a charge of 0.25% annually, a Combination 5% roll-up and Highest Anniversary Value Death Benefit for a charge of 0.50% annually, and a Highest Daily Value Death Benefit for a charge of 0.50% annually.

7. Applicants may add other optional living and death benefits to the Contract in the future. In addition to the optional insurance features, the Contract offers several optional administrative features at no additional cost (*e.g.*, auto rebalancing and systematic withdrawals).

8. The Contract offers variable investment options and a companion market-value adjustment option that is registered on Form S–3 (file no. 333–136996). At present, the Contract offers portfolios of Advanced Series Trust (formerly, American Skandia Trust), INVESCO AIM Variable Insurance Funds, Evergreen Variable Annuity Trust, First Defined Portfolio Fund, Franklin Templeton Variable Insurance Products Trust, Nationwide Variable Insurance Trust, and Wells Fargo Variable Trust. Under the Contract, Applicants reserve the right to add new underlying funds and series, and to substitute new portfolios for existing portfolios (subject to Commission approval).

9. An owner choosing to annuitize under the Contract will have only fixed annuity options available. Those fixed

[1] PALAC also offers a ''private label'' version of the Contract, called Optimum XTra, which is sold through Linsco/Private Ledger Corp. References to the ''Contract'' in this application are intended to include that private label version.

annuity options include annuities offering payments for life, payments based on joint lives, payments for life with a certain period, and fixed payments for a certain period. The latest annuitization date is the first day of the month coinciding with, or immediately following the later of the annuitant's 95th birthday or the fifth annuity anniversary.

10. Under the Contract, PALAC will apply a Contract Credit to the Contract owner's account value with respect to any purchase payment made during the first six years that the Contract has been in effect. Purchase payments made in the seventh year of the Contract and later will not receive any Contract Credit. The amount of the Contract Credit is determined by the year in which the purchase payment is made and the amount of purchase payments that already have been made under the Contract (aka ''cumulative'' purchase payments). Once purchase payments total $100,000 or more, the Contract Credit is 8% in year one of the Contract, 6% in year two, 4% in year three, 3% in year four, 2% in year five, and 1% in year six. So long as cumulative purchase payments amount to less than $100,000, the Contract Credit is 6% in year one of the Contract, 5% in year two, 4% in year three, 3% in year four, 2% in year five and 1% in year six. PALAC will pay Contract Credits from its general account assets. PALAC will allocate each Contract Credit to the variable investment options in the same proportion that the corresponding purchase payment is allocated to such options.

11. With respect to Contracts issued on or after the date of the Commission order under this application, Applicants wish to recapture the full amount of any Contract Credit under the scenarios identified in the following sentence. Specifically, Applicants will recapture a Contract Credit if (a) the Contract is surrendered during the free look period, or (b) the Contract Credit was applied within 12 months prior to death (except that PALAC will not recapture the Contract Credit to the extent that the death benefit is equal to the account value, but after the recovery of all or a portion of the Contract Credit, the death benefit would be equal to less than purchase payments minus proportional withdrawals) or (c) the Contract Credit was applied within 12 months prior to the surrender of the Contract under the medically-related surrender provision (*e.g.*, if the owner is diagnosed with a ''fatal illness'' and chooses to invoke this contract provision on that basis). (The medically-related surrender feature is not available in New York.)

**Applicants' Legal Analysis**

1. Section 6(c) of the 1940 Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions, from the provisions of the 1940 Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

2. Applicants request that the Commission, pursuant to Section 6(c) of the 1940 Act, issue an order to the extent necessary to permit the recapture of the Contract Credits under the circumstances described above. Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

3. Applicants submit that the recapture of the Contract Credits will not raise concerns under Sections 2(a)(32), 22(c) and 27(i)(2)(A) of the 1940 Act, and Rule 22c-1 thereunder. The Contract Credits will be recaptured only if the owner (a) exercises his/her free look right, (b) dies within 12 months after receiving the Contract Credit (except as described above), or (c) makes a medically-related surrender within 12 months after receiving the Contract Credit. The amounts recaptured equal the Contract Credit provided by PALAC from its own general account assets.

4. Applicants argue that when PALAC recaptures the Contract Credit, it is merely retrieving its own assets, and the owner has not been deprived of a proportionate share of the Account's assets, because his or her interest in the Contract Credit amount has not vested. With respect to a Contract Credit recaptured upon the exercise of the free-look privilege, it would be unfair to allow an owner exercising that privilege to retain the Contract Credit under a Contract that has been returned for a refund after a period of only a few days. If PALAC could not recapture the Contract Credit during the free look period, individuals could purchase a Contract with no intention of retaining it, and simply return it for a quick profit. Applicants also note that the Contract owner is entitled to retain any investment gain attributable to the Contract Credit, even if the Contract Credit is ultimately recaptured. Furthermore, the recapture of the Contract Credit if death or a medically-related surrender occurs within 12 months after receipt of a Contract Credit is designed to provide PALAC with a measure of protection against ''anti-selection.'' The risk here is that an owner, with full knowledge of impending death or serious illness, will make very large payments and thereby leave PALAC less time to recover the cost of the Contract Credit, to PALAC's financial detriment.

5. Applicants submit that the provisions for recapture of the Contract Credit does not, and any such Future Contract provisions will not, violate Sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act, and Rule 22c-1 thereunder.

6. The recapture of a Contract Credit could be viewed as involving the redemption of redeemable securities for a price other than one based on the current net asset value of an Account. Applicants state that the recapture of the Contract Credit does not involve either of the evils that Rule 22c-1 was intended to address, namely: (a) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or redemption or repurchase at a price above it, and (b) other unfair results, including speculative trading practices. Applicants assert that the proposed recapture of the Contract Credit does not pose a threat of dilution. To effect a recapture of a Contract Credit, interests in an owner's account will be redeemed at a price determined on the basis of the current net asset value. The amount recaptured will equal the amount of the Contract Credit that PALAC paid out of its general account assets. Although the owner will be entitled to retain any investment gain attributable to a Contract Credit, the amount of that gain will be determined on the basis of current net asset value. Therefore, no dilution will occur upon the recapture of a Contract Credit. Applicants also submit that the second harm that Rule 22c-1 was designed to address, namely speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of a Contract Credit.

7. Applicants submit that their request for an order that applies to the Account or any Future Accounts established by PALAC in connection with the issuance of Contracts and Future Contracts, and underwritten or distributed by PAD or other broker-dealers, is appropriate in the public interest. Such an order would promote competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications, thereby reducing administrative

expenses and maximizing the efficient use of Applicants' resources. Investors would not receive any benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issue under the 1940 Act that has not already been addressed in this application. Having Applicants file additional applications would impair Applicants' ability effectively to take advantage of business opportunities as they arise.

8. Applicants undertake that Future Contracts funded by the Account or by Future Accounts that seek to rely on the order issued pursuant to the application will be substantially similar to the Contract in all material respects.

**Conclusion**

Applicants submit that their request for an order meets the standards set out in Section 6(c) of the 1940 Act and that an order should, therefore, be granted.

For the Commission, by the Division of Investment Management, under delegated authority.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–18801 Filed 8–13–08; 8:45 am]

**BILLING CODE 8010–01–P**

## DEPARTMENT OF STATE

**[Public Notice 6307]**

### U.S. National Commission for UNESCO Notice of Partially Closed Meeting

The U.S. National Commission for UNESCO will hold a meeting by conference call on Thursday, August 28, 2008, beginning at 11 a.m. Eastern Time. The open portion of the call should last approximately fifteen minutes and will address the UNESCO Associated Schools Project Network. Additional topic areas that relate to UNESCO may be discussed as needed. The Commission will accept brief oral comments from members of the public during the open portion of this conference call. The public comment period will be limited to approximately ten minutes in total with three minutes allowed per speaker. Members of the public who wish to present oral comments or listen to the conference call must make arrangements with the Executive Secretariat of the National Commission by August 26, 2008. The second portion of the teleconference meeting will be closed to the public to allow the Commission to discuss applications for the U.S. National Commission for UNESCO Laura W. Bush Traveling Fellowship, a fellowship funded through privately donated funds. This call will be closed pursuant to Section 10(d) of the Federal Advisory Committee Act and 5 U.S.C. 552b(c)(6) because it is likely to involve discussion of information of a personal nature regarding the relative merits of individual applicants where disclosure would constitute a clearly unwarranted invasion of personal privacy.

For more information contact Alex Zemek, Executive Director of the U.S. National Commission for UNESCO, Washington, DC 20037. Telephone: (202) 663–0026; Fax: (202) 663–0035; E-mail: *DCUNESCO@state.gov.*

Dated: August 7, 2008.

**Alex Zemek,**

*Executive Director,U.S. National Commission for UNESCO, Department of State.*

[FR Doc. E8–18843 Filed 8–13–08; 8:45 am]

**BILLING CODE 4710–19–P**

## DEPARTMENT OF TRANSPORTATION

**[Docket No. DOT–OST–2008–0182]**

### Office of Small and Disadvantaged Business Utilization (OSDBU); Notice of Request for Renewal of Data Collection by the Office of Small and Disadvantaged Business Utilization's (OSDBU) Regional Small Business Transportation Resource Centers (SBTRCs)

**Notice of Correction**

This Notice of Correction announces cancellation of the published 30-day notice in the **Federal Register** (73 FR 45092–45093) on August 1, 2008. For this Notice of information collection, refer to the published 60-day notice in the **Federal Register** (73 FR 36368–36370) on June 26, 2008.

Agency Information Collection Activities; Request for Comments, Renewal and Approval of Information Collection(s): Regional Center Intake Form (DOT F 4500) and Regional Resource Center Monthly Report Form (DOT F 4502).

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Office of Small and Disadvantaged Business Utilization (OSDBU) invite the public to comment about our intention to request the Office of Management and Budget's (OMB) approval to renew information collection forms, associated with OSDBU. The collection involves the use of the Regional Center Intake Form, (DOT F 4500) which documents the type of assistance provided to each small business that is enrolled in the program.

The use of the Regional Resource Center Monthly Report Form, (DOT F 4502) will highlight activities, such as counseling, marketing, meetings/conferences, and services to businesses as completed during the month. The information will be used to ascertain whether the program is providing services to its constituency, the small business community, in a fair and equitable manner. The information collected is necessary to determine whether small businesses are participating in DOT funded and DOT assisted opportunities with the DOT.

The Counseling Information Form, (DOT F 4640.1) has been eliminated and the information contained in that form is now consolidated into the Regional Resource Center Monthly Report Form (formerly titled Monthly Report of Operations Form). To eliminate duplication and to streamline the data collection process, OSDBU revised the Monthly Report of Operations Form into the Regional Resource Center Monthly Report Form.

We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995. On June 26, 2008, OSDBU published a 60-day notice in the **Federal Register** (73 FR 36368) Docket # OST–2008–0182, informing the public of OSDBU's intention to extend an approved information collection.

**DATES:** Written comments should be submitted by: September 15, 2008 and submitted to the attention of the DOT/OST Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Docket library, Room 10102, 725 17th Street, NW., Washington, DC 20503 or *oira_submission @omb.eop.gov* (e-mail).

**FOR FURTHER INFORMATION CONTACT:** Arthur D. Jackson, 202–366–5344 Office of Small and Disadvantaged Business Utilization, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W56 462, Washington, DC 20590. Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Title:* U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization (OSDBU).

*OMB Control No: 2105–0554; Form No.:* DOT F 4500, Regional Center Intake.

*Form and Form No.:* DOT F 4502, Regional Resource Center Monthly Report Form.

*Affected Public:* Representatives of DOT Regional Small Business Transportation Resource Centers and

the Small Businesses community on a national basis.

*Type of Review:* Clearance and Renewal.

*Abstract:* In accordance with Public Law 95–507, an amendment to the Small Business Act and the Small Business Investment Act of 1953, OSDBU is responsible for the implementation and execution of the Department of Transportation (DOT) activities on behalf of small businesses, in accordance with Section 8, 15 and 31 of the Small Business Act (SBA), as amended. The Office of Small and Disadvantaged Business Utilization also administers the provisions of Title 49, of the United States Code, Section 332, the Minority Resource Center (MRC) which includes the duties of advocacy, outreach and financial services on behalf of small and disadvantaged business businesses and those certified under CFR 49 parts 23 and or 26 as Disadvantaged Business Enterprises (DBE). The Small Business Transportation Resource Regional Centers will collect information on small businesses, which includes Disadvantaged Business Enterprise (DBE), Women-Owned Small Business (WOB), Small Disadvantaged Business (SDB), 8(a), Service Disabled Veteran Owned Business (SDVOB), Veteran Owned Small Business (VOSB), HubZone, and types of services they seek from the SBTRCs. Services and responsibilities of the SBTRCs include business analysis, general management & technical assistance and training, business counseling, outreach services/ conference participation, short-term loan assistance. The cumulative data collected will be analyzed by the OSDBU to determine the effectiveness of services provided, including counseling, outreach, and financial services. Such data will also be analyzed by the OSDBU to determine agency effectiveness in assisting small businesses to enhance their opportunities to participate in government contracts and subcontracts.

The Regional Center Intake Form, (DOT F 4500) is used by the Regional SBTRC staff to enroll small business clients into the program in order to create a viable database of firms that can participate in government contracts and subcontracts, especially those projects that are transportation related. In addition, each enrolled small business will be assigned a client number that can track the firm's involvement in the services offered by the SBTRCs. Each area on the form must be filled in electronically by the SBTRCs and retained in secured files of the client. The completion of the form is used as a tool for making decisions about the needs of the business, such as; referral to technical assistance agencies for help, identifying the type of profession or trade of the business, the type of certification that the business holds, length of time in business, and location of the firm.

The SBTRCs must complete an Intake Form and retain copies in secured files in their offices. A limited amount of privacy information is requested on this form. We have informed the public that the Privacy Act is stated on the form. Under the Privacy Act (5 U.S.C. 552) any person can request to see or get copies of any personal information that DOT has in his or her file, when that file is retrievable by individual identifiers, such as name or Social Security Numbers. Request for information about another party may be denied unless DOT has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. This can assist the SBTRCs in developing a business plan or adjusting their business plan to increase its ability to market its goods and services to buyers and potential users of their services.

*Respondents:* Small Business Transportation Resource Centers.

*Estimated Number of Respondents:* 100.

*Frequency:* The information will be collected monthly.

*Estimated Total Burden on Respondents:* 600 hours.

The Regional Resource Center Monthly Report Form (DOT F 4502) for each SBTRC must submit a monthly status report of business activities conducted during the 30 day time frame. The form is used to capture activities and accomplishments that were made by the Regional SBTRCs during the course of the month. In addition, the form includes a data collection section where numbers and hours are reported and a section that is assigned for a written narrative that provides back up that supports the data.

Activities to be reported are (1) Counseling Activity which identifies the counseling hours provided to businesses, number of new appointments, and follow-up on counseled clients. (2) Activity for Businesses Served identifies the type of small business that is helped, such as a DBE, 8(a), WOB, HubZone, SDB, SDVOB, or VOSB. (3) Marketing Activity includes the name of an event attended by the SBTRC and the role played when participating in a conference, workshop or any other venue that relates to small businesses. (4) Meetings that are held with government representatives in the region, or at the state level, are an activity that is reported. (5) Events Hosted by the SBTRCs, such as small business workshops, financial assistance workshops, matchmaking events, are activities that are reported on a monthly basis.

*Respondents:* Small Business Transportation Resource Centers.

*Estimated Number of Respondents:* 100.

*Frequency:* The information will be collected monthly.

*Estimated Total Burden on Respondents:* 1200 hours.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Departments estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information collection; and (d) ways to minimize the burden of the collection of information on respondents, by the use of electronic means, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC on August 8, 2008.

**Patricia Lawton,**

*DOT Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. E8–18841 Filed 8–13–08; 8:45 am]

**BILLING CODE 4910–9X–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Availability of Draft Alternatives Working Paper for the Proposed Southern Nevada Supplemental Airport, Las Vegas, Clark County, NV Correction

**AGENCY:** Federal Aviation Administration.

**ACTION:** Notice of Availability of Draft Alternatives Working Paper, correction.

**SUMMARY:** The Federal Aviation Administration (FAA) in cooperation with the Bureau of Land Management (BLM) issued a notice of Availability of Draft Alternatives Working Paper that was published in the **Federal Register** on August 4, 2008 (73 FR 45268). That notice advised the public the Draft

Alternatives Working Paper for the Draft EIS will be made available for public comment pursuant to section 304 of the *Vision 100 Century of Aviation Act of 2003* (Pub. L. 108–176) [49 U.S.C. 47171(I)]. This notice corrects the days of the comment period from 30 days to 60 days.

**FOR FURTHER INFORMATION CONTACT:** David B. Kessler, AICP, Project Manager, Southern Nevada Supplemental Airport EIS, AWP–610.1, Airports Division, Federal Aviation Administration, Western-Pacific Region, P.O. Box 92007, Los Angeles, California 90009–2007, Telephone: 310/725–3615. Comments on the draft Alternatives Working Paper should be submitted to the address above and must be received no later than 5 p.m. Pacific Standard Time, Friday, October 3, 2008.

The Draft Alternatives Working Paper will be available for public comment for 60 days. Written comments on the Draft Alternatives Working Paper should be submitted to the address above under the heading **FOR FURTHER INFORMATION CONTACT** and must be received no later than 5 p.m. Pacific Standard Time, Friday, October 3, 2008.

Issued in Hawthorne, California, on August 5, 2008.

**Mark A. McClardy,**

*Manager, Airports Division, Western-Pacific Region, AWP–600.*

[FR Doc. E8–18634 Filed 8–13–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Environmental Assessment: Jefferson County, IN and Trimble County, KY

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Intent (NOI).

**SUMMARY:** The Federal Highway Administration (FHWA) is issuing this notice to advise the public that FHWA will prepare an Environmental Assessment (EA) to determine the need and feasibility of improvements to the Ohio River Crossing along U.S. 421 in Jefferson County, Indiana and Trimble County, Kentucky. This project will adhere to the requirements of section 6002 of SAFETEA–LU. The existing bridge connects the historic communities of Milton, Kentucky and Madison, Indiana. The objectives of this study are to assess the feasibility of rehabilitating or replacing the bridge, as well as other alternatives, for improving safety and mobility in the general project vicinity.

Comments on the scope of the EA for the proposed project should be forwarded no later than September 12, 2008.

**FOR FURTHER INFORMATION CONTACT:** Address all comments concerning this notice to Greg Rawlings of the FHWA Kentucky Division at 502.223.6728 or via e-mail at *Gregory.Rawlings@FHWA.dot.gov.* For additional information, contact Robert Martin, P.E., Project Manager for the Kentucky Transportation Cabinet, at 502.564.3730 or via e-mail at *RobertD.Martin@KY.gov.*

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Kentucky Transportation Cabinet (KYTC) and Indiana Department of Transportation (INDOT), will prepare an EA to determine the need and feasibility of rehabilitating or replacing the Milton Madison Bridge and its approaches over the Ohio River between Indiana and Kentucky. The current structure was originally constructed in 1929 then later rehabilitated in the late 1990s. The existing bridge is 3,181 feet in length and has two 10-foot travel lanes. The study area includes the existing U.S. 421 corridor and the general vicinity of the communities of Milton, Kentucky and Madison, Indiana. The nearest alternate crossings are the I–65 Kennedy Bridge in Louisville (46 miles downstream) and the bridge at Markland Locks and Dam (26 miles upstream). The condition of the Milton Madison Bridge is prompting this project, coupled with other issues including traffic demand and accessibility.

The objectives of this study are to assess the feasibility of rehabilitating or replacing the bridge, as well as other alternatives, for improving safety and mobility in the general project vicinity. This study will conform to Kentucky's environmental guidance, Indiana's procedural manual for preparing environmental documents, and the new SAFETEA–LU section 6002 requirements.

*Environmental Issues:* Possible environmental impacts include effects to historical properties, historic districts, or archaeological sites, specifically as related to Madison's status as a National Historic Landmark; displacement of commercial and/or residential properties; increased noise; viewshed impacts; impacts to water resources, flood plains, prime farmland, sensitive biological species and their habitat; land use compatibility impacts; community impacts; and impacts to agricultural lands.

*Alternatives:* The EA will consider alternatives that include the No-Build (Do Nothing) Alternative as well as a full range of build alternatives including rehabilitating the existing structure, applying transportation system management principles, and constructing a new bridge on the existing or new alignment.

*Scoping and Comment:* FHWA encourages broad participation in the EA process and review of the resulting environmental documents. Comments, questions, and suggestions related to the project and potential socioeconomic and environmental concerns are invited from all interested agencies and the public at large to ensure that the full range of issues related to the proposed action and all reasonable alternatives are considered and all significant issues are identified. These comments, questions, and suggestions should be forwarded to either phone number or e-mail address listed above.

Early Coordination Letters will be sent to the appropriate Federal, State and local agencies by September 2008 describing the project, following a project kick-off coordinated through a media news release. An invitation letter will be sent to potential Cooperating Agencies, Participating Agencies, and Section 106 Consulting Parties inviting the agencies to officially take part in the study, encouraging agency comments and suggestions concerning the proposed project, and further defining the roles of agencies. Existing and future conditions will be identified as work progresses and presented to stakeholders, agencies, and the public. The draft purpose and need for the project will be developed and preliminary alternatives identified. The agencies, stakeholders, and public will have an opportunity to review and comment on this information. The purpose and need and preliminary alternatives will be available for public review and a Resource Agency Meeting, Project Advisory Group Meeting, and Public Information Meeting will be held. Public notice will be given as to the time and place of the meetings. Agencies and the public will also have an opportunity to comment at various study stages, including: (1) Definition of purpose and need; (2) establishment of screening criteria; (3) screening of initial alternatives; (4) selection of final alternatives; and (5) the review of environmental documentation. Project Advisory Group meetings will be conducted regularly as the project moves forward to secure input from key stakeholders as decisions are made.

Notices of availability for the purpose and need and identification of

preliminary alternatives, evaluation and screening of preliminary alternatives, and identification of final alternatives will be provided through direct mail, e-mail, the project Web site available at *http://www.miltonmadisonbridge.com,* and other media. Notification also will be sent to Federal, State, local agencies, persons and organizations that submit comments or questions. Precise schedules and locations for public meetings will be announced in the local news media and the project Web site. Interested individuals and organizations may request to be included on the mailing list for distribution of meeting announcements and associated information.

*Other Approvals for Federal Permits:* The following approvals for Federal permits are anticipated to be required: The Navigational Permit Application from the U.S. Coast Guard and the Section 404 Permit from the Army Corps of Engineers. Additionally, Section 401 Permits may be required from the Kentucky Energy and Environment Cabinet and the Indiana Department of Environmental Management.

(Catalog of Federal Domestic Assistance Program No. 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to the program.)

**Authority:** 23 U.S.C. 315; 23 CFR 771.123; 49 CFR 1.48.

Issued on: July 30, 2008.

**Dennis Luhrs,**

*Assistant Division Administrator, Federal Highway Administration, Frankfort, Kentucky.*

[FR Doc. E8–18832 Filed 8–13–08; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

### Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

Time and Date: September 4, 2008, 12 noon to 3 p.m., Eastern Daylight Time.

Place: This meeting will take place telephonically. Any interested person may call Mr. Avelino Gutierrez at (505) 827–4565 to receive the toll free number and pass code needed to participate in these meetings by telephone.

Status: Open to the public.

Matters to be Considered: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

**FOR FURTHER INFORMATION CONTACT:** Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Dated: August 11, 2008.

**William A. Quade,**

*Associate Administrator for Enforcement and Program Delivery.*

[FR Doc. E8–18940 Filed 8–12–08; 4:15 pm]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

**[Docket No.: FTA–2008–0035]**

### National Transit Database: Natural Disaster Adjustments for Urbanized Area Apportionments

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of Proposed New Policy on Natural Disaster Adjustments for Urbanized Area Formula Grant Apportionment Data

**SUMMARY:** This notice provides interested parties with the opportunity to comment on the Federal Transit Administration's (FTA) National Transit Database (NTD) proposed new policy on natural disaster adjustments to NTD data. If a transit provider suffers a marked decrease in transit service due to a natural disaster, FTA proposes to allow that transit provider to be ''held harmless'' in the apportionment of formula grants for urbanized areas. In this case, FTA would use the transit provider's data from the NTD report year before the natural disaster in the apportionment, but use data from the current NTD report year for all other transit providers. Under this proposed policy, FTA would only make this adjustment upon the request of the affected transit provider or the designated recipient for the urbanized area, and FTA would grant this request at its discretion based on the disaster's demonstrated severity and impacts. FTA proposes for this policy to take effect for the 2007 NTD Report Year, which is the data to be used in the FY 2009 apportionment of formula grants for urbanized areas.

**DATES:** Comments must be received on or before September 15, 2008. FTA will consider comments filed after this date to the extent practicable.

**ADDRESSES:** You may submit comments [identified by FTA Docket ID Number FTA–2008–0035] at the Federal eRulemaking Portal at: *http://www.regulations.gov*. Follow the online instructions for submitting comments.

*Fax:* 202–493–2251.

*Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

*Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

*Instructions:* When submitting comments you must use docket number FTA–2008–0035. This will ensure that your comment is placed in the correct docket. If you submit comments by mail, you should submit two copies and include the above docket number. Note that all comments received will be posted, without change, to *http://www.regulations.gov* including any personal identifying information.

**FOR FURTHER INFORMATION CONTACT:** For program issues, John D. Giorgis, Office of Budget and Policy, (202) 366–5430 (telephone); (202) 366–7989 (fax); or *john.giorgis@dot.gov* (e-mail). For legal issues, Richard Wong, Office of the Chief Counsel, (202) 366–0675 (telephone); (202) 366–3809 (fax); or *richard.wong@dot.gov* (e-mail).

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The National Transit Database (NTD) was established by Congress ''to help meet the needs of * * * the public for information on which to base public transportation service planning * * *'' (49 U.S.C 5335). To support this goal, recipients or beneficiaries of Urbanized Area Formula Grants (Section 5307) or Other Than Urbanized Area Formula (Section 5311) Grants are required to report to the NTD. Other providers of transit service in urbanized areas report voluntarily to the NTD. Currently, over 650 transit agencies in urbanized areas report to the NTD through an Internet-based reporting system. Each year, performance data from these submissions are used to apportion over $5 billion of FTA funds under the Urbanized Area Formula Grants and Fixed-Guideway Modernization Grants Programs. These data are also used in the annual National Transit Summaries and Trends report, the biennial Conditions and Performance Report to Congress, and in meeting FTA's obligations under the Government Performance and Results Act.

FTA currently allows a transit provider that is severely impacted by a natural disaster to request a waiver from reporting to the NTD for the current year. This policy is based on the NTD Rule (49 CFR Part 630), which provides for a waiver from the mandatory NTD reporting requirements if reporting to the NTD would cause ''unreasonable expense or inconvenience.'' When FTA grants such a waiver to an urbanized area reporter that has previously reported to the NTD, FTA automatically includes data from the last-available NTD report year for the reporter in the apportionment of formula grants for urbanized areas. However, FTA does not currently have policies or procedures that would allow it to use NTD data from a prior report year in the apportionment of formula grants for urbanized areas for a transit provider that is able to report for the current year.

**II. Proposed Policy Change**

If a transit provider suffers a marked decrease in transit service due to a natural disaster, FTA proposes to allow that transit provider to be ''held harmless'' in the apportionment of formula grants for urbanized areas. The affected provider may request that their data from the NTD report year before the natural disaster occurred be used in place of data for the current report year in the apportionment. FTA would continue to use data from the current NTD report year for all other transit providers in the apportionment. The designated recipient for an urbanized area may also make this request on behalf of an affected provider. This adjustment would not be automatic, and FTA will not make this adjustment unless requested by the affected provider or the designated grant recipient for the urbanized area.

Under the proposed policy, FTA would approve or deny the request for the adjustment at its discretion. FTA will base its decision on the following factors: (1) Whether a Federal disaster declaration was in place for all or part of the current report year, for either all or part of the transit provider's service area; (2) whether the adjustment request demonstrates that the decrease in transit service from the report year before the natural disaster is in large part due to the ongoing impacts of the natural disaster; and (3) whether the decrease in transit service reasonably appears to be temporary, and thus not reflective of the true transit needs of the urbanized area. FTA will not grant adjustment requests that do not address all of these factors. Adjustment requests should include sufficient documentation to allow FTA to evaluate the request based on these factors. FTA may request additional information from an applicant for an adjustment to evaluate the request based on these factors. If the adjustment request is granted, the NTD data in all publicly-available data sets and data products would remain unadjusted, and would reflect the actual NTD submission for the transit provider. The only adjustment would be in the data sets used for the apportionments of formula grants for urbanized areas.

FTA proposes for this policy to take effect for the 2007 NTD Report Year, which is the data to be used in the FY 2009 apportionment of formula grants for urbanized areas. This policy would remain in effect for the 2008 NTD Report Year, and will be included in the NTD Annual Manual for the 2009 Report Year.

Issued in Washington, DC, this 8th day of August 2008.

**James S. Simpson,**

*Administrator.*

[FR Doc. E8–18939 Filed 8–12–08; 4:15 pm]

**BILLING CODE 4910–57–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Ex Parte No. 664 (Sub-No. 1)]**

### Use of a Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Capital

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice.

**SUMMARY:** The Board proposes to use a multi-stage Discounted Cash Flow (DCF) model to complement its use of the Capital Asset Pricing Model (CAPM) in determining the cost-of-equity component of the railroad industry's cost of capital.

**DATES:** Comments are due on or before September 15, 2008. Reply comments are due on or before October 14, 2008.

**ADDRESSES:** Comments may be submitted either via the Board's e-filing format or in traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's Web site at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies referring to STB Ex Parte No. 664 (Sub-No. 1) to: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

**FOR FURTHER INFORMATION CONTACT:** Paul Aguiar, (202) 245–0323. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

**SUPPLEMENTARY INFORMATION:** Each year the Board measures the cost of capital for the railroad industry in the prior year. The Board then uses this cost-of-capital figure for a variety of regulatory purposes. It is used to evaluate the adequacy of individual railroads' revenues for that year.[1] It is also employed in cases involving rail rate review, feeder line applications, rail line abandonment proposals, trackage rights compensation cases, and rail merger review, as well as in our Uniform Rail Costing System (URCS).

The Board calculates the cost of capital as the weighted average of the cost of debt and the cost of equity, with the weights determined by the capital structure of the railroad industry (i.e., the proportion of capital from debt or equity on a market-value basis). While the cost of debt is observable and readily available, the cost of equity (the expected return that equity investors require) can only be estimated. How best to calculate the cost of equity is the subject of a vast amount of literature. Because the cost of equity cannot be directly observed, estimating the cost of equity requires adopting a finance model and making a variety of simplifying assumptions.

In *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital*, STB Ex Parte No. 664 (STB served Jan. 17, 2008), the Board changed the methodology that it uses to calculate the railroad industry's cost of equity. We concluded that the time had come to modernize our regulatory process and replace the aging single-stage DCF model that had been employed since 1981. After a thorough rulemaking process, we decided to calculate the cost of equity using CAPM. During that process, several parties urged the Board to use a multi-stage DCF in conjunction with CAPM. We elected to adopt a stand-alone CAPM approach because the record in that proceeding did not support adopting any particular DCF model. But, we did not want to foreclose the possibility of augmenting CAPM with a DCF approach. As we explained in the January 2008 decision (footnotes omitted):

> There may be merit to the idea of using both models to estimate the cost of equity. While CAPM is a widely accepted tool for estimating the cost of equity, it has certain

[1] *See* 49 U.S.C. 10704(a)(2),(3); *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981), *modified*, 3 I.C.C.2d 261 (1986), *aff'd sub nom. Consolidated Rail Corp.* v. *United States*, 855 F.2d 78 (3d Cir. 1988).

strengths and weaknesses, and it may be complemented by a DCF model. In theory, both approaches seek to estimate the true cost of equity for a firm, and if applied correctly should produce the same expected result. The two approaches simply take different paths towards the same objective. Therefore, by taking an average of the results from the two approaches, we might be able to obtain a more reliable, less volatile, and ultimately superior estimate than by relying on either model standing alone.

Ultimately, both CAPM and DCF are economic models that seek to measure the same thing. CAPM seeks to do so by estimating the level of expected returns that investors would demand given the perceived risks associated with the company. By contrast, DCF models estimate the expected rate of return based on the present value of the cash flows that the company is expected to generate. Both approaches are plausible and intuitive, but are merely models.

The Federal Reserve Board noted in its testimony in STB Ex Parte No. 664 that ''academic studies had demonstrated that using multiple models will improve estimation techniques when each model provides new information * * *'' [2] There is, in fact, robust economic literature confirming that, in many cases, combining forecasts from different models is more accurate than relying on a single model.[3]

The record before us in STB Ex Parte No. 664 was insufficient for us to adopt a particular DCF model. But, it did illuminate a number of criteria to guide us in that effort. We issued an Advance Notice of Proposed Rulemaking, *Use of a Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Capital*, STB Ex Parte No. 664 (Sub-No. 1) (STB served Feb. 11, 2008) (ANPRM) in which we requested comments on the use of a multi-stage DCF model to complement the use of CAPM in determining the railroad industry's cost-of-capital. Specifically, we invited interested parties to submit comments on an appropriate multi-stage DCF for use in the Board's cost-of-equity determination. In the ANPRM, we identified the requirements that a multi-stage DCF model should satisfy.

First, and foremost, the proposed DCF model should be a multi-stage model. For cost-of-capital determinations for years 1981 through 2005, the agency relied on a single-stage DCF. That model required few inputs and few judgment calls, permitting the agency to promptly develop an estimate of the cost-of-equity component of the cost of capital. But its simplicity was due in part to an assumption that the 5-year growth rate would remain constant thereafter. That assumption proved problematic. In recent years, railroad earnings have grown at a very rapid pace, exceeding the long-run growth rate of the economy as a whole. While it is certainly possible that railroad earnings will continue to grow rapidly for many years, they cannot do so forever as the single-stage DCF model assumes. Thus, in years when the 5-year growth rate is very high, this model may overstate the cost of equity. Similarly, in years when the railroads experience a downturn and the predicted 5-year growth rate is very low, the model may understate the cost of equity.

Second, we noted in the ANPRM that the DCF model should not focus on dividend payments only. Finance theory suggests that the value of a firm should be independent of its dividend policy.[4] Although changes in dividends do influence stock prices, it is because these changes are ''news'' to the market. The market then responds in valuing the stock. It is the news, not the dividend distribution, that drives the change in prices. In addition, companies return profits to their shareholders in ways other than increasing dividends, including buying back shares. As a result, we no longer think that a simple dividend distribution model is an acceptable framework for valuing firms. Rather, broader measures of cash flow or shareholder returns should be incorporated.

Third, the DCF model responsive to the ANPRM should be limited to those firms that pass the screening criteria set forth in *Railroad Cost of Capital—1984*, 1 I.C.C.2d 989 (1985) (*Railroad Cost of Capital—1984*). Under those criteria, we include in the analysis only those Class I carriers that: (1) Had rail assets greater than 50% of their total assets; (2) had a debt rating of at least BBB (Standard & Poors) and Baa (Moody's); (3) are listed on either the New York or American Stock Exchange; and (4) paid dividends throughout the year. A Class I railroad is one having annual carrier operating revenues of at least $250 million in 1991 dollars. 49 CFR 1201.1–1. Those criteria tend to result in establishing the cost of capital for an efficiently run railroad firm, on which data are readily and transparently available.

Fourth, we sought a multi-stage DCF model that, when used in combination with CAPM, would enhance the precision of the resulting cost-of-equity estimate, one that over a sufficiently lengthy historical analysis period would result in a combined forecast with a lower variance than a forecast relying on the CAPM approach alone.

In response to the ANPRM, the Board received comments from Arkansas Electric Cooperative Corporation (AECC); the Association of American Railroads (AAR) and the Western Coal Traffic League (WCTL).

AAR and WCTL each proposed multi-stage DCF models. AAR's proposed model satisfied all of the four fundamental requirements identified by the Board in the ANPRM. AAR's model is a multi-stage DCF. Its cash flow component is broader than models using only dividends. It is limited to the four carriers that meet the Board's screening criteria, and it reduces variance in estimating the cost of equity as compared to using the CAPM approach alone.

WCTL submitted a multi-stage DCF model and asserted that such a model could provide further validation of the CAPM results. However, WCTL asserted that it did not believe the Board should receive and consider evidence concerning multi-stage DCF calculations along with CAPM calculations as part of our annual railroad industry cost-of-capital determinations at this time. WCTL suggested that we revisit this matter in five years.

AECC did not submit a model in response to the ANPRM, but deferred to the WCTL. AECC did express the opinion that the use of a multi-stage DCF model in conjunction with CAPM could enhance the precision of the resulting cost-of-equity estimate.

**Proposed Rule**

For the reasons set forth below, the Board proposes to determine the cost of equity of the railroad industry by using the average of the estimate produced by the CAPM model and the Morningstar/Ibbotson multi-stage DCF model identified by AAR.

The Morningstar/Ibbotson model meets the four requirements we established in the ANPRM. It employs

[2] February 2007 Hearing Tr. at 18.

[3] *See generally* David F. Hendry & Michael P. Clements, *Pooling of Forecasts,* VII Econometrics Journal 1 (2004); J.M. Bates & C.W.J. Granger, *The Combination of Forecasts in Essays in Econometrics: Collected Papers of Clive W.J. Granger. Vol. I: Spectral Analysis, Seasonality, Nonlinearity, Methodology, and Forecasting* 391–410 (Eric Ghysels, Norman R. Swanson, & Mark W. Watson, eds., 2001); Spyros Makridakis and Robert L. Windler, *Averages of Forecasts: Some Empirical Results,* XXIX Management Science 987 (1983).

[4] *See, e.g.*, Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance, and the Theory of Investment*, 48 Am. Econ. Rev., 261–97 (1958). By integrating tax—and information-related considerations on capital structure and dividend policy choices, Modigliani and Miller greatly influenced subsequent developments in the field of finance. *See* Sudipto Bhattacharya, *Corporate Finance and the Legacy of Miller and Modigliani*, 2 J. Econ. Perspectives 135–47 (1988).

three different growth rates of the railroads meeting the Board's criteria. Stage 1 represents the first 5 years. In each year of Stage 1, the growth rate used is the median value of the three-to-five-year growth estimates for the qualifying railroads as provided to Morningstar by railroad industry analysts. Stage 2 represents years 6 through 10. In Stage 2, the growth rate is the average of the earnings growth for the qualifying railroads taken as a whole. Stage 3 begins with year 11 and continues thereafter. The growth rate in Stage 3 is assumed to be the long-run nominal growth rate of the aggregate U.S. economy. This three-tier approach eliminates the problem posed by a single-stage DCF model which could overstate the cost of equity by assuming a constant growth rate. The precise equation that describes the Morningstar/Ibbotson multi-stage DCF model is set forth in the submission by the AAR.[5]

The model also meets the second requirement that it not limit future cash flows to dividend payments alone. Rather, the model incorporates a wider array of cash flows for equity investors by applying expectations of earnings growth to the firms' cash flows, not just actual dividends. Thus, it accounts for all of the relevant cash flows a reasonable investor is likely to anticipate, including share repurchases and earnings' reinvestments to obtain greater future cash flows, along with dividends. The Morningstar/Ibbotson model includes the impact of capital expenditures on a firm's cash flow.

The Morningstar/Ibbotson model meets our third requirement, as it can be modified to use only those firms that pass the screening criteria set forth in *Railroad Cost of Capital—1984*.

And AAR has demonstrated that the model satisfies our fourth requirement. When combined with CAPM and applied over a sufficiently lengthy historical analysis period, the Morningstar/Ibbotson multi-stage DCF model enhances the precision of the resulting cost-of-equity estimate with a lower variance than a forecast relying on the CAPM approach alone. For the period 1998 through 2006, for the four Class I railroads meeting the *Railroad Cost of Capital—1984* standards, the Morningstar/Ibbotson model produces a cost of equity ranging from 11.6% to 14.6%, while the CAPM yields estimates between 9.7% and 12.7%. Averaging the estimates from the two models yields estimates in the range between 11.1% and 13.4%. The standard deviation for both the Morningstar/Ibbotson model and the CAPM model is 0.92 while the standard deviation of the average of the two models is only 0.75. As such, using the average of both CAPM and the multi-stage DCF model produces a more stable and more precise cost-of-equity estimate.

Finally, the Morningstar/Ibbotson model is a commercially accepted multi-stage DCF model. It was developed by disinterested, respected third parties and created for use by the financial community in evaluating publicly traded equities and in making real-world investment decisions. It was not developed as a tool for litigation or advocacy, and the same model is used by Morningstar to estimate the cost of equity for hundreds of different industries. The model's variables can be estimated from publicly available data, and here can be applied to those railroads that meet the Board's selection criteria. While there may well be a variety of other multi-stage DCF models—each with different assumptions and inputs—that might satisfy the four requirements set forth in our notice, we believe it is prudent to use an approach that was not developed simply as a tool for litigation before the Board, but rather to use an approach that has been tested in the marketplace and is used to estimate the cost of equity for different industries, not just the rail industry. For this reason, we are proposing to use the Morningstar/Ibbotson model, rather than the model developed and proposed by WTCL.

Interested parties are invited to comment on the proposed use of the Morningstar/Ibbotson model in conjunction with CAPM. Parties should also comment on the best way to integrate the two approaches and whether a simple average is the best approach.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 7, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

**Anne K. Quinlan,**

*Acting Secretary.*

## Appendix

The cost of equity for each firm ($r_i$) in the Morningstar/Ibbotson three-stage DCF model is the solution to the following equation:

$$\mathrm{MV}_{i0} = \sum_{t=1}^{5} \frac{CF_{i0}\left(1+g_{i1}\right)^{t}}{\left(1+r_i\right)^{t}} + \sum_{t=6}^{10} \frac{CF_{i5}\left(1+g_{i2}\right)^{(t-5)}}{\left(1+r_i\right)^{t}} + \frac{\dfrac{\mathrm{IBEI}_{i10}\left(1+g_{i3}\right)}{r_i - g_{i3}}}{\left(1+r_i\right)^{10}}$$

Where,

$MV_{i0}$ = market value of firm *i* in year 0 (i.e., the year for which the cost of equity is being estimated)

$CF_{it}$ = average cash flow for firm *i* at the end of year *t*

$g_{i1}$ = earnings growth rate for firm *i* in stage *j* (*j* = 1, 2, or 3).

$IBEI_{10} = IBEI_0 (1+g_1)^5(1+g_2)^5$

$IBEI_0$ is determined by the same process as $CF_0$

The industry cost of equity (*R*) for the three-stage DCF model is computed as the market value weighted average of the individual firm cost of equity estimates:

$$\mathrm{R} = \sum_{t=1}^{N} S_i r_i,$$

Where, $s_i$ is firm *i*'s share of the total industry market value and N is the number of firms in the industry composite, such that:

$$\mathrm{S}_i = \left(\mathrm{MV}_{0i}\right) / \sum_{t=1}^{N} MV_{0i}$$

[FR Doc. E8–18865 Filed 8–13–08; 8:45 am]

**BILLING CODE 4915–01–P**

[5] *See* AAR V.S. of Stangle at 10.

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[INTL–941–86 and INTL–655–87]**

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing notice of proposed rulemaking, INTL–941–86, and temporary regulation, INTL–655–87 (TD 8178), Passive Foreign Investment Companies (§§ 1.1294–1T and 1.1297–3T).

**DATES:** Written comments should be received on or before October 14, 2008 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, (202) 622–6665, at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Passive Foreign Investment Companies.

*OMB Number:* 1545–1028.

*Regulation Project Number:* INTL–941–86 (Notice of Proposed Rulemaking) and INTL–655–87 (Temporary regulation).

*Abstract:* These regulations specify how U.S. persons who are shareholders of passive foreign investment companies (PFICs) make elections with respect to their PFIC stock.

*Current Actions:* There are no changes being made to the form at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 275,000.

*Estimated Time Per Respondent:* 25 minutes.

*Estimated Total Annual Burden Hours:* 112,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 31, 2008.

**Glenn P. Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. E8–18785 Filed 8–13–08; 8:45 am]

**BILLING CODE 4830–01–P**

## UTAH RECLAMATION MITIGATION AND CONSERVATION COMMISSION

### Notice of Availability of the Record of Decision for the Lower Duchesne River Wetlands Mitigation Project (LDWP), Duchesne and Uintah Counties, UT

**AGENCY:** Utah Reclamation Mitigation and Conservation Commission.

**ACTION:** Notice of Availability of the Record of Decision (ROD).

**SUMMARY:** On May 22, 2008, the Utah Reclamation Mitigation and Conservation Commission (Commission) selected the Proposed Action presented in the Final Environmental Impact Statement (FEIS), Lower Duchesne River Wetlands Mitigation Project (LDWP), April 2008. The Record of Decision (ROD) for that action is available as described below. The LDWP is required to mititate for impacts of the Bonneville Unit of the Central Utah Project and to fulfill other commitments to the Ute Indian Tribe made as part of the Central Utah Project. The U.S. Department of the Interior—Central Utah Project Completion Act Office, and the Commission were joint-lead agencies for the FEIS, and the Ute Indian Tribe was the lead planning partner. The LDWP FEIS addresses potential impacts related to construction and operation of features proposed for the LDWP and incorporates responses to public comments received on the Draft EIS. Based on the information and analyses in the FEIS and other relevant information, the Commission determined the Proposed Action responds best to LDWP needs and purposes and does so in an environmentally sound manner with least potential for adverse effects on social and economic resources.

**ADDRESSES:** Copies of the ROD and/or FEIS can be obtained at the Utah Reclamation Mitigation and Conservation Commission, 230 South 500 East, Suite 230, Salt Lake City, Utah, 84102–2045. They may also be viewed on the internet via the following Web address: *http://www.mitigationcommission.gov/news.html.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Richard Mingo, Planning Coordinator at (801) 524–3168.

**SUPPLEMENTARY INFORMATION:** The LDWP will fulfill certain environmental mitigation commitments of the Bonneville Unit of the Central Utah Project. The Strawberry Aqueduct and Collection System is a key component of the Bonneville Unit, collecting water from the Upper Duchesne River and its tributaries and storing it in Strawberry Reservoir for delivery westward to the Wasatch Front in Utah. As a result, wetlands and wildlife habitats along the Duchesne River have been adversely impacted. Substantial wetland impacts occurred on the Uintah and Ouray Reservation lands of the Ute Indian Tribe. The LDWP has been planned in conjunction with the Ute Indian Tribe and is intended to fulfill a longstanding commitment to mitigate for these impacts on Ute Indian tribal wetland wildlife resources and to provide additional wetland/wildlife benefits to the Ute Indian Tribe. The Proposed Action would create, restore, and otherwise enhance riparian wetland habitats along or near the Duchesne

River in Utah as partial mitigation for these Bonneville Unit impacts. Approximately 4,807 acres of land composed of 3,215 acres of Ute Indian Tribal trust lands, and 1,592 acres of fee lands to be acquired by the Federal Government, would be acquired and developed into three cohesive wetlands management units. A portion of the water currently managed by the Bureau of Indian Affairs for the Ute Indian Tribe under the existing Uinta Indian Irrigation Project would be utilized, along with water that may be acquired with fee land acquisitions, to create, restore and enhance wetlands throughout the LDWP area. Lands acquired in fee title (except lands acquired by eminent domain) would be transferred to the Ute Indian Tribe. All LDWP lands (leased Tribal trust and acquired lands) would be managed for project purposes by the Ute Indian Tribe under management agreements with the Joint Lead Agencies to achieve the prescribed wetlands-associated fish and wildlife benefits, and for other wetland/wildlife related tribal benefits. A Notice of Intent to initiate public scoping and prepare a Draft EIS for the LDWP was published in the **Federal Register** on April 25, 2001 (66 FR 20827). Scoping was accomplished by means of three public meetings convened in Ft. Duchesne, Roosevelt and Salt Lake City, Utah in May 2003. Joint Lead Agencies filed the DEIS with the EPA on November 17, 2003. Notice of Availability of the DEIS was announced in the **Federal Register** on November 24, 2003 (68 FR 65943). Three public meetings were held in Ft. Duchesne, Roosevelt and Salt Lake City, Utah in December 2003, to receive public comment on the DEIS. Comments received during the public comment period from November 17, 2003 to February 17, 2004, were considered in preparation of the FEIS.

Dated: August 4, 2008.

**Mark A. Holden,**

*Projects Manager.*

[FR Doc. E8–18831 Filed 8–13–08; 8:45 am]

**BILLING CODE 4310–05–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Homeless Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Homeless Veterans will be held on September 15–16, 2008, at the DoubleTree Hotel Albuquerque, 201 Marquette, NW., Albuquerque, New Mexico. On September 15, the session will convene at 8 a.m. and end at 4 p.m. On September 16, the session will convene at 8 a.m. and end at 2:30 p.m. The meeting is open to the public.

The purpose of the Committee is to provide the Secretary of Veterans Affairs with an ongoing assessment of the effectiveness of the policies, organizational structures, and services of the Department in assisting homeless veterans. The Committee shall assemble and review information relating to the needs of homeless veterans and provide advice on the most appropriate means of offering assistance to homeless veterans. The Committee will make recommendations to the Secretary regarding such activities.

On September 15, the Committee will review the responses to the recommendations contained in the 2008 Annual Report of the Advisory Committee on Homeless Veterans (which was submitted to the Secretary in the spring of 2008). The Committee will also receive briefings from VA and other federal departments on programs and activities affecting homeless veterans. On September 16, the Committee will continue to receive informational presentations and will begin its discussion of recommendations to be included in the upcoming annual report.

Those wishing to attend the meeting should contact Mr. Pete Dougherty, Designated Federal Officer, at (202) 461–7401. No time will be allocated for receiving oral presentations from the public. However, the Committee will accept written comments from interested parties on issues affecting homeless veterans. Such comments should be referred to the Committee at the following address: Advisory Committee on Homeless Veterans, Homeless Veterans Programs Office (075D), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

Dated: August 8, 2008.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. E8–18786 Filed 8–13–08; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Gulf War Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Gulf War Veterans will hold a meeting on September 24–25, 2008, at the Residence Inn by Marriott, 1199 Vermont Avenue, NW., Washington, DC.

The purpose of the Committee is to provide advice and recommendations to the Secretary of Veterans Affairs on issues that are unique to veterans who served in the Southwest Asia theater of operations during the 1990–1991 period of the Gulf War.

On September 24, the Committee will meet in open session from 8:30 a.m. to 12 noon. This session will focus on the Veterans Health Administration (VHA) with emphasis on the Gulf War Registry and outreach activities, a review of the priority groups for health care enrollment, and a panel discussion on clinical care research, guidelines and practices.

In the afternoon of September 24, the Committee will meet in closed session at the Washington, DC VA Medical Center (VAMC). The Committee will be meeting with clinicians and individual patients receiving services at the VAMC. The session will be closed to protect the privacy of the patients and to minimize possible interference with the delivery of medical services at the VAMC. Closing the meeting is in compliance with 5 U.S.C. 552b(c)(6).

On September 25, the Committee will meet in open session from 8:30 a.m. to 4:30 p.m. and will focus on activities by the Veterans Benefits Administration (VBA), particularly those activities conducted by VBA's Compensation and Pension Service. This will include discussions concerning the disability compensation system, the chronology of VBA responses to Gulf War issues including its actions responding to statutory changes, and VBA's outreach to Gulf War veterans.

Public comments will be received on September 24, from 11:15 a.m. until 11:45 a.m. and on September 25, from 1 p.m. until 1:30 p.m. Individuals wishing to speak must register not later than September 17, 2008, by contacting Lelia Jackson at (202) 461–5758 or by e-mail at *lelia.jackson@va.gov,* and by submitting 1–2 page summaries of their comments for inclusion in the official record. Public comments will be limited to five minutes each. A sign-in sheet will be available each day. Members of the public may also submit written statements for the Committee's review to the Advisory Committee on Gulf War Veterans, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

Interested parties may also listen in by teleconferencing into the meeting. The toll-free teleconference line will be open from 8:30 a.m. until 12 noon on September 24 and from 8:30 a.m. until 4:30 p.m. on September 25. To register for the teleconference, contact Lelia Jackson at (202) 461–5758 or *Lelia.jackson@va.gov.*

Any member of the public seeking additional information should contact Laura O'Shea, Designated Federal Officer, at (202) 461–5765.

Dated: August 6, 2008.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. E8–18787 Filed 8–13–08; 8:45 am]

**BILLING CODE 8320–01–P**

Federal Register

Thursday,
August 14, 2008

# Part II

# Department of Commerce

## Patent and Trademark Office

**37 CFR Parts 1, 2, 7, et al.**

**Changes to Representation of Others Before the United States Patent and Trademark Office; Final Rule**

**DEPARTMENT OF COMMERCE**

**Patent and Trademark Office**

**37 CFR Parts 1, 2, 7, 10, 11, and 41**

**[Docket No.: PTO–C–2005–0013]**

**RIN 0651–AB55**

## Changes to Representation of Others Before the United States Patent and Trademark Office

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Final rule.

**SUMMARY:** The United States Patent and Trademark Office (Office) is adopting new rules governing the conduct of disciplinary investigations, issuing warnings when closing such investigations, disciplinary proceedings, non-disciplinary transfer to disability inactive status and reinstatement to practice before the Office. The Office is adopting a new rule regarding recognition to practice before the Office in trademark cases. The Office also is adopting a new rule to address a practitioner's signature and certificate for correspondence filed in the Office. These changes will enable the Office to better protect the public from practitioners who do not comply with the Office's ethics rules and from incapacitated practitioners.

**DATES:** *Effective Date:* September 15, 2008.

**FOR FURTHER INFORMATION CONTACT:** Harry I. Moatz ((571) 272–6069), Director of Enrollment and Discipline (OED Director), directly by phone, by facsimile to (571) 273–6069 marked to the attention of Mr. Moatz, or by mail addressed to: Mail Stop OED-Ethics Rules, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

**SUPPLEMENTARY INFORMATION:** Congress granted express authority to the Office to ''establish regulations, not inconsistent with law, which * * * may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.'' 35 U.S.C. 2(b)(2)(D). Congress also provided that the ''Director may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before the Patent and Trademark Office, * * * any * * * agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D) of this title, or who shall, by word, circular, letter, or advertising, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the Office. The reasons for any such suspension or exclusion shall be duly recorded.'' 35 U.S.C. 32. In so doing, Congress vested express and implied authority with the Office to prescribe rules of procedure that are applicable to practitioners recognized to practice before the Office.

On December 12, 2003, the Office published *Changes to Representation of Others Before the United States Patent and Trademark Office,* a Notice of Proposed Rule Making in the **Federal Register** (68 FR 69441), 1278 *Off. Gaz. Pat. Office* 22 (Jan. 6, 2004) proposing to amend parts 1 and 2 of the rules and procedures governing patent and trademark prosecution (Title 37 of the Code of Federal Regulations), reserving part 10 and introducing part 11. Included in the proposed rules for part 11 were rules governing the conduct of investigations, disciplinary proceedings, issuing warnings, disciplinary proceedings, reinstatement, recognition to practice before the Office in trademark cases, and a practitioner's signature and certificate for correspondence filed in the Office—principally rules 11.2, 11.3, 11.5, and 11.14 through 11.61. One hundred sixty-three written comments were received. After reviewing the written comments, the Office decided to revise a number of the rules published in the December 12, 2003 Notice. The Office published *Changes to Representation of Others Before the United States Patent and Trademark Office,* a Supplemental Notice of Proposed Rule Making (SNPR), on February 28, 2007, in the **Federal Register** (72 FR 9196), 1316 *Off. Gaz. Pat. Office* 123 (Mar. 27, 2007) regarding rules 11.1, 11.2, 11.3, 11.5, and 11.14 through 11.61 and requested additional comments on those revised proposed rules. The Office received fifteen comments from professional and intellectual property organizations, law firms, individual practitioners and members of the public. Many of the revised proposed rules were similar to the approach of the current regulations. Other revised proposed rules were intended to introduce new disciplinary procedures for practitioners who have been suspended or disbarred in other disciplinary jurisdictions for ethical or professional misconduct, practitioners convicted of serious crimes, and practitioners having disability issues.

The December 12, 2003 Notice also proposed changes to the ethics rules governing the conduct of recognized patent practitioners and others practicing before the Office as well as rules governing enrollment of recognized practitioners. Following receipt and consideration of the comments, provisions included in the December 12, 2003 Notice regarding enrollment were adopted in final rules on July 26, 2004. See *Changes to Representation of Others Before the United States Patent and Trademark Office,* Final Rule, published in the **Federal Register**, 69 FR 35428 (June 24, 2004), 1288 *Off. Gaz. Pat. Office* 109 (November 16, 2004). Comments on proposed changes to the substantive ethics rules remain under consideration by the Office, and it is expected that the ethics rules will be the subject of a later, separate notice.

In addition, several rules proposed in the December 12, 2003 Notice are directly or indirectly dependent on the development of electronic systems to implement rules governing annual fees, § 11.8, and continuing legal education, §§ 11.12 and 11.13. For example, proposed §§ 11.8(d), 11.12 and 11.13 are directly dependent on development of the systems, whereas proposed § 11.11(b) through 11.11(f) are indirectly dependent on the development. Further consideration of rules dependent on implementing electronic systems awaits completion of the development and implementation of the systems. Accordingly, the rules below do not refer to §§ 11.8(d), 11.11(b) through 11.11(f), 11.12 and 11.13.

The primary purposes for adopting procedures for disciplining practitioners who fail to conform to adopted standards and non-disciplinary procedures for transferring practitioners to disability inactive status include affording practitioners due process, protecting the public, preserving the integrity of the Office, and maintaining high professional standards.

These final rules will be applied only prospectively, not retroactively. In implementing the foregoing, with respect to investigations, the rules will be applied to the future actions in pending investigations and in investigations commencing on or after the effective date of the final rules. With respect to disciplinary proceedings that have already been commenced by filing a complaint under 37 CFR 10.134 before the effective date of the final rules, the final rules will not apply. Instead, these disciplinary proceedings will continue under the rules in effect on the date the complaint under § 10.134 was filed. With regard to disciplinary proceedings

commenced after the effective date of the rules, the final rules will apply. With regard to § 11.5, the final rule will be applied only prospectively to assignments and licenses written on or after the effective date of the final rules.

**Discussion of Specific Rules**

Title 37 of the Code of Federal Regulations, Parts 1, 2, 7, 11 and 41, are revised by amending §§ 1.4, 1.8, 1.9, 2.2, 2.11, 2.17, 2.18, 2.19, 2.24, 2.33, 2.101, 2.102, 2.105, 2.111, 2.113, 2.119, 2.161, 2.193, 7.25, 7.37, 11.1, 11.2, 11.3, 11.5 and 41.5, and adding §§ 11.14 through 11.99 as follows:

*Sections 1.4, 1.8, 1.9, 2.2, 2.11, 2.17, 2.18, 2.19, 2.24, 2.33, 2.101, 2.102, 2.105, 2.111, 2.113, 2.119, 2.161, 2.193, 7.25, 7.37:* Sections 1.4(d)(3), 1.4(d)(4)(i), 1.4(d)(4)(ii)(C), 1.8(a)(2)(iii)(A), 1.9(j), 2.2(c), 2.11, 2.17(a)–(c), 2.18(a), 2.19(b), 2.24, 2.33(a)(3), 2.101(b), 2.102(a), 2.105(b)(1) and (c)(1), 2.111(b), 2.113 (b)(1), 2.119(d), 2.161(b)(3), 2.193(c)(2), 7.25(a) and 7.37(b)(3) are revised to change or add an appropriate cross-reference to Part 11 or change a cross-reference to an appropriate section in Part 11.

*Section 11.1:* The definitions of ''disqualified,'' ''Federal agency,'' ''Federal program'' and ''Serious Crime'' are added to the definitions, and the definitions of ''attorney or lawyer'' and ''State'' are revised. ''Disqualified,'' which appears in § 11.24, would mean any action that prohibits a practitioner from participating in or appearing before the program or agency, regardless of how long the prohibition lasts or the specific terminology used. ''Federal program'' is defined as meaning any program established by an Act of Congress or administered by a Federal agency and ''Federal agency'' is defined as meaning any authority of the executive branch of the Government of the United States.

The definition of ''attorney or lawyer'' is revised to correct an error. The Office published a final rule in the **Federal Register** of June 24, 2004 (69 FR 34428) entitled ''Changes to Representation of Others Before the United States Patent and Trademark Office.'' In that final rule, there was an inadvertent omission of the word ''not'' preceding the term ''under'' in the first sentence of the definition of ''attorney or lawyer'' in § 11.1. An attorney or lawyer in good standing with the highest court of a State should not also be ''under an order of any court or Federal agency suspending, enjoining, restraining, disbarring or otherwise restricting the attorney from practice before the bar of another State or Federal agency.'' The definition is corrected by inserting ''not'' before ''under'' in the first sentence.

The definition of state is revised to clarify that state includes Commonwealths and territories of the United States, as well as the fifty states and the District of Columbia. Thus, the ''court of * * * any State'' in § 11.25(a) would include any courts of the fifty states, the District of Columbia, and Commonwealths and territories of the United States.

*Section 11.2:* Section 11.2 provides for the appointment and duties of the Director of Enrollment and Discipline (OED Director), as well as petitions for review of decisions of the OED Director. Section 11.2(a) is revised to delete provisions for appointment of an OED Director in the event the OED Director is absent or recuses himself or herself from a case, as provision for these circumstances by rule is believed to be unnecessary.

Section 11.2(b)(4) is revised to provide for conducting investigations of matters involving possible grounds for discipline of practitioners. Except in matters meriting summary dismissal, the OED Director will afford an accused practitioner an opportunity to respond to a reasonable inquiry before a disposition is recommended or undertaken. Section 11.2(b)(5) is added to include among the OED Director's duties the initiation of a disciplinary proceeding and performance of such other duties in connection with investigations and disciplinary proceedings as may be necessary, provided the consent of a panel of three members of the Committee on Discipline is first obtained when required. Section 11.2(b)(6) is added to provide among the OED Director's duties oversight of the preliminary screening of information and closing investigations as provided for in § 11.22.

The titles of §§ 11.2(c) and 11.2(d) are revised to limit the petition provisions of these subsections to matters ''regarding enrollment or recognition.'' Section 11.2(c) is revised to provide that a petition to the OED Director be accompanied by payment of the fee set forth in § 1.21(a)(5)(i). A sentence in § 11.2(d) proposed in December 2003 providing that ''[a] decision dismissing a complaint or closing an investigation is not subject to review by petition'' has been deleted from § 11.2(d).

Section 11.2(d) also is revised to provide that a petition under this section must be accompanied by the fee set forth in § 1.21(a)(5)(ii), that a petition not filed within thirty days may be dismissed as untimely, that briefs and supporting memoranda must accompany the petition, and that an oral hearing will not be granted except when considered necessary by the USPTO Director.

Section 11.2(e) is added to provide for filing a petition to invoke supervisory authority of the USPTO Director in disciplinary matters in appropriate circumstances. For example, a person dissatisfied with a decision dismissing a grievance or closing an investigation may petition the USPTO Director to exercise supervisory authority over the OED Director. The procedure in subsection (e) is comparable to the supervisory review procedure in § 1.181 and assures supervisory review when appropriate. No fee is required for a petition to invoke the supervisory authority of the USPTO Director in disciplinary matters.

A petition under § 11.2(e) must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Briefs or memoranda in support of the petition must accompany the petition. Where facts are to be proven, the proof in the form of affidavits or declarations (and exhibits, if any) must accompany the petition. The OED Director may be directed by the USPTO Director to file a reply to the petition, supplying a copy to the petitioner. An oral hearing will not be granted except when considered necessary by the USPTO Director. The filing of a petition will not stay an investigation, disciplinary proceeding or other proceedings. The petition may be dismissed as untimely if it is not filed within thirty days of the mailing date of the action or notice from which relief is requested. Any request for reconsideration of the decision of the USPTO Director may be dismissed as untimely if not filed within thirty days after the date of said decision.

*Section 11.3:* Section 11.3(a), which provides for suspension of rules, in essence, continues the provisions of former § 10.170 that could be applied to regulations addressing procedures. For example, the provisions of this section may be invoked by an applicant for registration to waive the sixty-day period set in § 11.7 for completing an application for registration where events beyond applicant's control, such as a flood or fire, prevented applicant from supplying information to complete an application. The inclusion of § 11.3(a) should not be construed as an indication that there could ever be any extraordinary situation when justice requires waiver of a disciplinary rule.

Section 11.3(b) is added to provide that no petition under this section may stay a disciplinary proceeding unless ordered by the USPTO Director or a hearing officer.

*Section 11.5:* The sole paragraph of § 11.5 is renumbered as § 11.5(a). Section 11.5(a) substantially continues the provisions of § 11.5, except that ''applications'' has been changed to ''matters'' at the end of the first sentence.

Subsection 11.5(b) is added to define practice before the Office as including a law-related service that comprehends any matter connected with the presentation to the Office or any of its officers or employees relating to a client's rights, privileges, duties, or responsibilities under the laws or regulations administered by the Office for the grant of a patent or registration of a trademark, or for enrollment or disciplinary matters. The section provides that nothing in § 11.5 prohibits a practitioner from employing or retaining non-practitioner assistants under the supervision of the practitioner to assist the practitioner in matters pending or contemplated to be presented before the Office.

Section 11.5(b)(1) provides a definition of practice before the Office in patent matters, which includes preparing and prosecuting any patent application, consulting with or giving advice to a client in contemplation of filing a patent application or other document with the Office, drafting the specification or claims of a patent application; drafting an amendment or reply to a communication from the Office that may require written argument to establish the patentability of a claimed invention; and drafting a communication for a public use, interference, reexamination proceeding, petition, appeal to the Board of Patent Appeals and Interferences, or other proceeding. This section also provides that registration to practice before the Office in patent cases sanctions the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications or other proceeding before the Office involving a patent application or patent in which the practitioner is authorized to participate. The services are identified as including consideration of the advisability of relying upon alternative forms of protection which may be available under state law, and drafting an assignment or causing an assignment to be executed in contemplation of filing or prosecution of a patent application if the practitioner is filing or prosecuting the patent application, and assignment does no more than replicate the terms of a previously existing oral or written obligation of assignment from one person or party to another person or party.

Section 11.5(b)(2) provides a definition of practice before the Office in trademark matters which includes consulting with or giving advice to a client in contemplation of filing a trademark application or other document with the Office; preparing and prosecuting an application for trademark registration; preparing an amendment or response which may require written argument to establish the registrability of the mark; and conducting an opposition, cancellation, or concurrent use proceeding; or conducting an appeal to the Trademark Trial and Appeal Board.

The provision in proposed rule 11.5(b)(3) regarding a practitioner's conduct occurring in a non-practitioner capacity has been withdrawn as being unnecessary. The provisions of revised proposed § 11.19 would cover misconduct occurring in a non-lawyer or non-agent capacity. Section 11.19 identifies several grounds for discipline, including, but not limited to, conduct that violates a mandatory disciplinary rule of the USPTO Code of Professional Responsibility and a conviction of a serious crime.

*Section 11.14:* Section 11.14 is added to set forth who may practice before the Office in trademark and other non-patent cases. Section 11.14(a), in essence, continues present practice under § 10.14(a) except as noted in the following discussion. The last sentence of § 11.14(a) adds a provision that registration as a patent practitioner does not entitle an individual to practice before the Office in trademark matters. An attorney who is no longer a member in good standing of the bar of the highest court of one state and not admitted to the bar in another state is not entitled to practice before the Office in trademark matters on the basis of the attorney's registration as a patent practitioner.

Thus, a practitioner registered with the Office as a patent attorney, but suspended or disbarred in the only state where the practitioner had been admitted to practice law, may not rely on the registration to continue to practice before the Office in trademark matters. Similarly, a practitioner registered as a patent attorney, but suspended or disbarred in the only state where the practitioner had been admitted to practice law, may not revert to registration as a patent agent prior to January 1, 1957, to continue to practice before the Office in trademark cases.

Section 11.14(b) continues the present practice under § 10.14(b). A second sentence has been added to § 11.14(b) to assure clarity under the present practice that, but for the one exception in the first sentence of this section, registration as a patent agent does not itself entitle an individual to practice before the Office in trademark matters.

Section 11.14(c) is added to continue the present practice under § 10.14(c), except as further clarified by the following provisions. The first sentence of § 11.14(c) is revised to provide that a foreign attorney or agent not a resident of the United States who seeks reciprocal recognition must file a written application for reciprocal recognition under paragraph (f) of § 11.14 and prove to the satisfaction of the OED Director that he or she is possessed of good moral character and reputation.

Sections 11.14(d) and (e) continue the present practices under former sections 10.14(d) and (e), except as noted in the following discussion. In § 11.14(e), ''on behalf of a client'' has been added to the end of the first sentence to make it clear that no individual is permitted to represent others before the Office in trademark matters other than those specified in paragraphs (a), (b), and (c) of this section.

Section 11.14(f) is added to expressly provide for filing an application for reciprocal recognition under § 11.14(c). This section codifies the practice of requiring an individual seeking reciprocal recognition under § 11.14(c) to apply in writing to the OED Director for reciprocal recognition and pay the fee specified in § 1.21(a)(1)(i).

*Section 11.15:* Section 11.15 is added to provide for refusal to recognize a practitioner. This section continues the present practice under former § 10.15. The second sentence makes clear that a practitioner who is suspended or excluded is not entitled to practice before the Office in patent, trademark, or other non-patent matters while suspended or excluded.

*Sections 11.16–11.17:* Sections 11.16–11.17 are reserved.

*Section 11.18:* Section 11.18(a) is added to continue the present practice under former § 10.18(a), and extend the practice to all documents filed with a hearing officer in a disciplinary proceeding. But for specified exceptions, every document filed with the Office or a hearing officer in a disciplinary proceeding must bear a signature, personally signed by such practitioner, in compliance with § 1.4(d)(1).

Section 11.18(b)(1) is added to continue the present practice of providing that a party presenting a paper certifies to the truthfulness of the content of his or her submissions to the Office. The term ''party'' is not limited to practitioners, and includes

applicants. The provisions of § 11.18(b)(1) continue the present practice under § 10.18(b)(1), except for extending the practice to submissions to a hearing officer in a disciplinary proceeding. Inasmuch as the hearing officer may be employed by another Federal agency, extension of the provisions of this section to submission to the hearing officer is believed to be appropriate. The provisions of § 11.18(b)(1) continue the present practice under § 10.18(b)(1) except as follows. Section 11.18(b)(1) is clarified to prohibit ''willfully and knowingly'' making false, fictitious or fraudulent statements or representations or ''willfully and knowingly'' making or using a false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry. This section repeats an obligation all parties submitting papers to the Office otherwise have under 18 U.S.C. 1001. This section applies the statutory standard of conduct applicable to the submission of material facts in courts to proceedings in the Office and to disciplinary proceedings.

Section 11.18(b)(1) also provides that whoever violates the provisions of § 11.18(b)(1) is subject to penalties in criminal statutes in addition to those under 18 U.S.C. 1001. Inasmuch as an offending paper may have little or no probative value, § 11.18(b)(1) provides that violation of the rule may jeopardize the probative value of the paper.

Unlike § 10.18(b)(1), § 11.18(b)(1) does not provide that violations of paragraph (b)(1) may jeopardize the validity of the application or document inasmuch as the conditions for valid application are set by statute. Similarly, unlike § 10.18(b)(1), § 11.18(b)(1) does not provide that violations of paragraph (b)(1) may jeopardize the validity or enforceability of any patent, trademark registration, or certificate resulting therefrom. It is unnecessary that the regulation remind parties of any civil jeopardy to which they are subject for a violation of paragraph (b)(1).

Section 11.18(b)(2) is added to provide that a party submitting a paper certifies to the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the paper is not being presented for any improper purpose, that other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the establishment of new law, that allegations and factual contentions have evidentiary support, and that denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief. Section 11.18(b)(2) continues the current practice under former § 10.18(b)(2) except for substitution of ''any proceeding'' for prosecution in subsection 11.18(b)(2)(i).

Section 11.18(c) is added to provide a non-exhaustive list of sanctions or actions the USPTO Director may take, after notice and reasonable opportunity to respond, for a violation of paragraph (b)(2)(i) through (b)(2)(iv) of § 11.18. Section 11.18(c) continues some of the sanctions under former § 10.18(c), including precluding a party or practitioner from submitting a paper, or presenting or contesting an issue; requiring a terminal disclaimer; or terminating the proceedings in the Office. Section 11.18(c) adds specific sanctions and actions, for example, striking the offending paper, referring a practitioner's conduct to the Director of Enrollment and Discipline for appropriate action; affecting the weight given to the offending paper; and terminating the proceedings in the Office.

These sanctions in § 11.18(c) conform to those discussed in conjunction with the 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure. The commentary to the 1993 Amendment indicated that a court ''has available a variety of possible sanctions to impose for violations, such as striking the offending paper; * * * referring the matter to disciplinary authorities.'' Like Rule 11 of the Fed. R. Civ. P., the provisions in § 11.18 do not attempt to exhaustively enumerate the factors that should be considered or the appropriate sanctions. The Office anticipates that in taking action under § 11.18 in applying sanctions, it would use the proper considerations utilized in issuing sanctions or taking action under Rule 11. Consideration may be given, for example, to whether the improper conduct was willful or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected an entire application, or only one particular paper; whether the person has engaged in similar conduct in other matters; whether the conduct was intended to injure; what effect the conduct had on the administrative process in time and expense; whether the responsible person is trained in law; what is needed to deter that person from repetition in the same case; and what is needed to deter similar conduct by others. All of these in a particular case may be proper considerations. See, 28 U.S.C.A. Fed. R. Civ. P. 11, Adv. Comm. Notes, 1993 Amendments, Subdivisions (b) and (c).

Section 11.18(d) is added to continue the present practice under former § 10.18(d) of providing notice that any practitioner violating the provisions of § 11.18 may also be subject to disciplinary action.

*Section 11.19:* Section 11.19 is added to set forth the disciplinary jurisdiction of the Office. Section 11.19(a) sets forth a list of practitioners who are subject to the disciplinary jurisdiction of the Office. These include practitioners administratively suspended, all practitioners engaged in practice before the Office; practitioners registered to practice before the Office in patent cases; inactivated practitioners, practitioners authorized to take testimony; and practitioners who have been transferred to disability inactive status, reprimanded, suspended, or excluded from the practice of law. Inasmuch as these rules are being adopted before the adoption of § 11.11(b) regarding administrative suspension and § 11.11(c) regarding administrative suspension, in connection with continuing education and annual fees, § 11.19(a) does not reference those actions. Instead, § 11.19(a) references practitioners inactivated under § 10.11. Also practitioners who have resigned are subject to such jurisdiction with respect to conduct undertaken prior to the resignation and conduct in regard to any practice before the Office following the resignation.

Section 11.19(b) is added to set forth the grounds for discipline and grounds for transfer to disability inactive status. The grounds for discipline include conviction of a serious crime, § 11.19(b)(1); discipline on ethical grounds imposed in another jurisdiction or disciplinary disqualification from participating in or appearing before any Federal program or agency, § 11.19(b)(2); and failure to comply with any order of a Court disciplining a practitioner, § 11.19(b)(3); or any final decision of the USPTO Director in a disciplinary matter; violation of the mandatory Disciplinary Rules identified in sections 10.20(b), § 11.19(b)(4); or violation of the oath or declaration taken by the practitioner, § 11.19(b)(5).

Section 11.19(b)(2) is added to set forth grounds for transfer to disability inactive status. The grounds include being transferred to disability inactive status in another jurisdiction; being judicially declared incompetent, being judicially ordered to be involuntarily committed after a hearing on the grounds of insanity, incompetency or disability, or being placed by court order under guardianship or conservatorship; or filing a motion requesting a disciplinary proceeding be held in abeyance because the

practitioner is suffering from a disability or addiction that makes it impossible for the practitioner to adequately defend the charges in the disciplinary proceeding.

Section 11.19(c) is added to set forth the manner for handling petitions to disqualify a practitioner. This section continues the present practice under former § 10.130(b).

Section 11.19(d) is added to provide for the OED Director to refer the existence of circumstances suggesting unauthorized practice of law to the authorities in the appropriate jurisdiction(s).

*Section 11.20:* Section 11.20 is added to set forth the disciplinary sanctions the USPTO Director may impose on a practitioner after notice and opportunity for a hearing, as well as to set forth transfer to disability inactive status. Section 11.20(a)(2) provides for exclusion from practice before the Office. Suspension may be imposed for a period that is appropriate under the facts and circumstances of the case. Section 11.20(a)(3) provides for reprimand, including both public and private reprimand.

Section 11.20(a)(4) provides for probation *in lieu* of or in addition to any other disciplinary sanction. The order imposing probation sets forth in writing the conditions of probation as well as whether, and to what extent, the practitioner is required to notify clients of the probation. The order also establishes procedures for the supervision of probation. Violation of any condition of probation is cause for the probation to be revoked, and the disciplinary sanction to be imposed for the remainder of the probation period. Revocation of probation occurs after an order to show cause why probation should not be revoked is resolved adversely to the practitioner.

Section 11.20(b) is added to provide that the USPTO Director may require a practitioner to make restitution either to persons financially injured by the practitioner's conduct or to an appropriate client's security trust fund, or both, as a condition of probation or of reinstatement. The restitution is limited to the return of unearned practitioner fees or misappropriated client funds. The rule does not contemplate restitution for the value of an invention or patent.

Section 11.20(c) is added to set forth transfer to disability inactive status. This section provides that the USPTO Director may, after notice and opportunity for a hearing, and where grounds exist to believe a practitioner has been transferred to disability inactive status in another jurisdiction, or has been judicially declared incompetent; judicially ordered to be involuntarily committed after a hearing on the grounds of incompetency or disability, or placed by court order under guardianship or conservatorship, transfer the practitioner to disability inactive status.

*Section 11.21:* Section 11.21 is added to codify the practice of issuing warnings. This section provides that a warning is not a disciplinary sanction. This section also provides that the ''OED Director may conclude an investigation with the issuance of a warning,'' which ''shall contain a brief statement of facts and imperative USPTO Rules of Professional Conduct relevant to the facts.'' Inasmuch as a warning is not a disciplinary sanction, a warning would not be made public.

*Section 11.22:* Section 11.22 is added to set forth provisions regarding the conduct of investigations of possible grounds for discipline. Section 11.22(a) authorizes the OED Director to investigate possible grounds for discipline. This section provides that an investigation may be initiated when the OED Director receives a grievance, information or evidence from any source suggesting possible grounds for discipline. The section further provides that neither unwillingness nor neglect by a grievant to prosecute a charge, nor settlement, compromise, or restitution with the grievant, shall in itself justify abatement of an investigation.

Section 11.22(b) provides for reporting information or evidence concerning possible grounds for discipline to the OED Director. Any person possessing information or evidence concerning possible grounds for discipline of a practitioner may report the information or evidence to the OED Director, who may request that the report be presented in the form of an affidavit or declaration.

Section 11.22(c) provides that information or evidence coming from any source that presents or alleges facts suggesting possible grounds for discipline of a practitioner will be deemed a grievance.

Section 11.22(d) provides for preliminary screening of information or evidence. This section provides that the ''OED Director shall examine all information or evidence concerning possible grounds for discipline of a practitioner.''

Section 11.22(e) provides for notifying a practitioner of an investigation. The section provides that the ''OED Director shall notify the practitioner in writing of the initiation of an investigation into whether a practitioner has engaged in conduct constituting possible grounds for discipline.''

Section 11.22(f) provides for the OED Director requesting information and evidence in the course of an investigation. Subsection 11.22(f)(1) provides that in the course of conducting an investigation, the OED Director may request information or evidence regarding possible grounds for discipline of a practitioner from the grievant, the practitioner, or any person who may reasonably be expected to provide information and evidence needed in connection with the grievance or investigation.

Subsection 11.22(f)(2) provides that the OED Director may request information and evidence regarding possible grounds for discipline of a practitioner from a non-grieving client either after obtaining the consent of the practitioner or upon a finding by a Contact Member of the Committee on Discipline, appointed in accordance with § 11.23(d), that good cause exists to believe that the possible ground for discipline alleged has occurred with respect to non-grieving clients. This section further provides that ''[n]either a request for, nor disclosure of, such information shall constitute a violation of any of the Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10 of this Subsection.''

Section 11.22(g) provides where the OED Director makes a request under paragraph (f)(2) of this section to the Contact Member of the Committee on Discipline, the Contact Member will not, with respect to the practitioner connected to the OED Director's request, participate in the Committee on Discipline panel that renders a probable cause decision.

Section 11.22(h) sets forth the actions the OED Director may take upon the conclusion of an investigation. The OED Director may close an investigation without issuing a warning or taking disciplinary action, issue a warning to the practitioner, institute formal charges upon approval of the Committee on Discipline, or enter into a settlement agreement with the practitioner and submit the same for approval to the USPTO Director.

Section 11.22(i) provides for closing investigation without issuing a warning or taking disciplinary action. There are four circumstances under this section when the OED Director must terminate an investigation and decline to refer a matter to the Committee on Discipline. Under § 11.22(i)(1), the OED Director closes an investigation without issuing a warning or disciplinary action upon determining that either the information or evidence is unfounded. Under

§ 11.22(i)(2), the OED Director closes the investigation without issuing a warning or taking disciplinary action when it is determined that the information or evidence relates to matters not within the jurisdiction of the Office. Under § 11.22(i)(3), the OED Director closes the investigation without issuing a warning or taking disciplinary action upon determining that as a matter of law, the conduct about which information or evidence has been obtained does not constitute grounds for discipline, even if the conduct may involve a legal dispute. Under § 11.22(i)(2)(4), the OED Director closes the investigation without issuing a warning or taking disciplinary action when the available evidence is insufficient to conclude that there is probable cause to believe that grounds exist for discipline.

*Section 11.23:* Section 11.23 is added to provide for a Committee on Discipline. Section 11.23(a) provides for the Committee to be appointed by the USPTO Director. The Committee on Discipline consists of at least three employees of the Office, and none of the Committee members are permitted to report directly or indirectly to the OED Director or any employee designated by the USPTO Director to decide disciplinary matters. This section further provides that each Committee member must be a member in good standing of the bar of the highest court of a State. The Committee members select a Chairperson from among themselves. Three Committee members constitute a panel of the Committee.

Section 11.23(b) sets forth the powers and duties of the Committee on Discipline. The Committee is empowered and has the duty to meet in panels at the request of the OED Director and, after reviewing evidence presented by the OED Director, by majority vote of the panel, determine whether there is probable cause to bring charges under § 11.32 against a practitioner; and to prepare and forward its own probable cause findings and recommendations to the OED Director.

Section 11.23(c) provides that no discovery is authorized of, and no member of the Committee may be required to testify about deliberations of, the Committee or of any panel.

*Section 11.24:* Section 11.24 is added to provide procedures for reciprocal discipline of a practitioner. Section 11.24(a) provides that a practitioner who is subject to the disciplinary jurisdiction of the Office and has been publicly censured, publicly reprimanded, subjected to probation, disbarred or suspended in another jurisdiction, or has been disciplinarily disqualified from participating in or appearing before any Federal program or agency shall notify the OED Director in writing of the same. This section also provides that a practitioner is deemed to be disbarred if he or she is disbarred, excluded on consent, or has resigned in lieu of a disciplinary proceeding.

Section 11.24(a) further provides for the OED Director, upon receiving notification that a practitioner subject to the disciplinary jurisdiction of the Office has been disciplined, to obtain a certified copy of the record or order regarding the public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification and file the same with the USPTO Director. The information received by the OED Director may come from any source, and therefore, the actions by OED Director are independent of whether the practitioner has self-reported. Without Committee on Discipline authorization, the OED Director can file a complaint complying with § 11.34 with the USPTO Director against the practitioner predicated upon the public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification, and request the USPTO Director to issue a notice and order as set forth in § 11.24(b).

Under § 11.24(a) regarding a practitioner who has been disqualified from participating in or appearing before any Federal program or agency, the program or agency need not use the term ''disqualified'' to describe the action. For example, an agency may use analogous terms, such as ''suspend,'' ''decertify,'' ''exclude,'' ''expel,'' or ''debar'' to describe the practitioner's disqualification from participating in the program or the agency.

Section 11.24(b) provides a procedure for initiating a reciprocal disciplinary proceeding. Under this section, the USPTO Director, upon receipt of a certified copy of the record or order regarding the practitioner, issues a notice directed to the practitioner in accordance with § 11.35 and to the OED Director. The notice includes (1) a copy of the record or order regarding the public censure, public reprimand, probation, disbarment, suspension, or disciplinary disqualification; (2) a copy of the complaint; and (3) an order directing the practitioner to file a response with the USPTO Director and the OED Director, within forty days of the date of the notice, establishing a genuine issue of material fact predicated upon the grounds set forth in §§ 11.24(d)(1)(i) through (d)(1)(iv) that the imposition of the identical public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification would be unwarranted and the reasons for the claim. In conformity with the changes to § 11.24(a), ''disciplined'' has been changed to ''censured, publicly reprimanded, subjected to probation, disbarred, suspended'' in the first sentence of this section; ''public censure, public reprimand, probation,'' has been added to § 11.24(b)(1); and ''publicly censured, publicly reprimanded, placed on probation,'' has been added to § 11.24(b)(3)(i).

Section 11.24(c) sets forth the effect of a stay in another jurisdiction on a reciprocal disciplinary proceeding occurring in the Office. Under this section, if the discipline imposed by another jurisdiction, probation or disciplinary disqualification imposed in the Federal program or agency has been stayed, any reciprocal discipline imposed by the USPTO may be deferred until the stay expires. In conformity with the changes to § 11.24(a), ''discipline'' has been changed to ''censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification'' in § 11.24(c).

Section 11.24(d) provides for a hearing and imposition of discipline. Under this section the USPTO Director hears the matter on the documentary record and imposes the identical discipline unless the USPTO Director determines that there is a genuine issue of material fact of the nature set forth in §§ 11.24(d)(1)(i) through (iv). In conformity with the changes to § 11.24(a), each occasion of ''discipline'' has been changed to ''censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification'' in the second sentence of this section.

The situation identified in § 11.24(d)(1)(i) is that the procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process. The situation identified in § 11.24(d)(1)(ii) is that there was such infirmity of proof establishing the conduct as to give rise to the clear conviction that the Office could not, consistently with its duty, accept as final the conclusion on that subject. The situation in § 11.24(d)(1)(iii) is that the imposition of the same discipline by the Office would result in grave injustice. The situation in § 11.24(d)(1)(iv) is that the practitioner was not the person involved in the prior disciplinary matter. In conformity with the changes to § 11.24(a), ''discipline'' has been changed to ''censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification'' in § 11.24(d)(1)(iii).

Under § 11.24(d)(2), if the USPTO Director determines that there is no genuine issue of material fact, the USPTO Director enters an appropriate final order. If the USPTO Director is unable to make such a determination because there is a genuine issue of material fact, the complaint is referred to a hearing officer for disposition and the practitioner is directed to file an answer to the complaint.

Section 11.24(e) provides for the effect of the adjudication in another jurisdiction or Federal agency or program. This section sets forth that a final adjudication in another jurisdiction or Federal agency or program that a practitioner, whether or not admitted in that jurisdiction, has been guilty of misconduct shall establish a *prima facie* case for discipline or probation for purposes of a disciplinary proceeding in this Office. In conformity with the changes to § 11.24(a), ''discipline'' has been changed to ''censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification'' in this section.

Section 11.24(f) sets forth the only circumstance when reciprocal discipline may be imposed *nunc pro tunc.* This section provides for imposing reciprocal discipline only upon the practitioner's request and only if the practitioner promptly notified the OED Director of his or her censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification in another jurisdiction, and establishes by clear and convincing evidence that the practitioner voluntarily ceased all activities related to practice before the Office and complied with all provisions of § 11.58. This section further provides that the effective date of any censure, public reprimand, probation, disbarment, suspension, or disciplinary disqualification imposed *nunc pro tunc* shall be the date the practitioner voluntarily ceased all activities related to practice before the Office and complied with all provisions of § 11.58. In conformity with the changes to § 11.24(a), ''discipline'' has been changed to ''censure, public reprimand, probation, disbarment, suspension'' in the first sentence. In conformity with the changes to § 11.24(a), in the second sentence, ''censure, public reprimand, probation,'' has been inserted before ''suspension''; a comma has been inserted after ''suspension''; ''or'' has been inserted between ''suspension'' and ''disbarment''; and ''or disciplinary disqualification'' has been added after ''disbarment.''

Section 11.24(g) provides for reinstatement following a reciprocal discipline proceeding. Under this section, a practitioner may petition for reinstatement under conditions set forth in § 11.60 no sooner than completion of the period of reciprocal discipline imposed, and compliance with all provisions of § 11.58.

*Section 11.25:* Section 11.25 is added to provide a procedure for interim suspension and discipline, after notice and opportunity for a hearing on the documentary record, based upon conviction of committing a serious crime. The first sentence of § 11.25(a) provides that upon being convicted of a crime in a court of the United States, any state, or a foreign country, a practitioner subject to the disciplinary jurisdiction of the Office shall notify the OED Director in writing of the same within thirty days from the date of such conviction. If the crime is not a serious crime, the OED Director processes the matter in the same manner as any other information or evidence of a possible violation of the Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10. The reference to the Mandatory Disciplinary Rules of Part 10 will obtain until such time as the Rules of Professional Conduct are adopted, at which time this section will be amended to reference the imperative Rules of Professional Conduct.

The second sentence of § 11.25(a) provides that the OED Director, upon being advised or learning that a practitioner subject to the disciplinary jurisdiction of the Office has been convicted of a crime, must make a preliminary determination whether the crime constitutes a serious crime warranting interim suspension. The third sentence of § 11.25(a) provides that where the crime is a serious crime, the OED Director will file with the USPTO Director proof of the conviction and request that the USPTO Director issue a notice and order as set forth in § 11.25(b)(2) of this section. The fourth sentence of § 11.25(a) provides that the OED Director must also, without Committee on Discipline authorization, file with the USPTO Director a complaint against the practitioner complying with § 11.34, predicated upon the conviction of a serious crime. The fifth sentence of § 11.25 provides that in the event the crime is not a serious crime, the OED Director must process the matter in the same manner as any other information or evidence of a possible violation of an imperative Rule of Professional Conduct coming to the attention of the OED Director.

Section 11.25(b) provides a procedure for imposing interim suspension and referral for disciplinary proceeding in the case of a practitioner convicted of a serious crime. Section 11.25(b)(1) provides that the USPTO Director has authority to place a practitioner on interim suspension, after a hearing on the documentary record.

Section 11.25(b)(2) provides for notifying the practitioner convicted of commission of a serious crime with notice of the proceeding. The USPTO Director issues a notice to the practitioner in accordance with § 11.35(a), (b) or (c), and to the OED Director. The notice contains a copy of the court record, docket entry, or judgment of conviction; a copy of the complaint; and an order directing the practitioner to inform the USPTO Director and OED Director, within thirty days of the date of the notice, of any genuine issue of material fact that the crime did not constitute a serious crime, that the practitioner is not the individual found guilty of the crime, or that the conviction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

Section 11.25(b)(3) provides procedures for a hearing on and entry of a final order on the OED Director's request for interim suspension. The request for interim suspension is heard by the USPTO Director on the documentary record unless the USPTO Director determines that the practitioner's response establishes a genuine issue of material fact that the crime did not constitute a serious crime, the practitioner is not the person who committed the crime, or the conviction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process. If the USPTO Director determines that there is no genuine issue of material fact regarding those defenses an appropriate final order is entered regardless of the pendency of any criminal appeal. Conversely, if the USPTO Director is unable to make such determination because there is a genuine issue of material fact, the USPTO Director would enter a final order dismissing the request for interim suspension and referring the complaint to a hearing officer for a hearing. Under the latter circumstances, the USPTO Director would also direct the practitioner to file an answer to the complaint in accordance with § 11.36. Section 11.25(b)(4) provides the USPTO Director with authority to terminate an interim suspension when it is in the interest of justice, and upon a showing of extraordinary circumstances, after affording the OED Director an opportunity to respond to the request to terminate interim suspension.

Section 11.25(b)(5) provides a procedure whereby the USPTO Director, upon entering an order for interim suspension, refers the complaint to the OED Director for institution of a formal disciplinary proceeding for an initial decision recommending the final disciplinary sanction to be imposed. The hearing officer, however, shall stay the disciplinary proceeding until all direct appeals from the conviction are concluded. Review of the initial decision of the hearing officer shall be pursuant to § 11.55.

Section 11.25(c) sets forth the standard for proving conviction and guilt. Section 11.25(c)(1) addresses conviction in the United States. Under this section, for purposes of a hearing for interim suspension and a hearing on the formal charges in a complaint filed as a consequence of the conviction, a certified copy of the court record, docket entry, or judgment of conviction in a court of the United States or any state establishes a *prima facie* case by clear and convincing evidence that the practitioner was convicted of the crime and that the conviction was not lacking in due process. Section 11.25(c)(2) addresses conviction in a foreign country. For purposes of a hearing for interim suspension and on the formal charges filed as a result of a finding of guilt, a certified copy of the court record, docket entry, or judgment of conviction in a court of a foreign country establishes a prima facie case by clear and convincing evidence that the practitioner was convicted of the crime and that the conviction was not lacking in due process. Nothing in this section precludes the practitioner from demonstrating in any hearing for interim suspension that there is a genuine issue of material fact to be considered when determining if the elements of a serious crime were committed in violating the criminal law of the foreign country and whether a disciplinary sanction should be entered.

Section 11.25(d) provides that if the USPTO Director determines that the crime is not a serious crime, the complaint is to be referred to the OED Director for investigation under § 11.22 and appropriate processing.

Section 11.25(e) provides a procedure for reinstatement upon reversal or setting aside a finding of guilt or a conviction. Under § 11.25(e)(1), if the practitioner demonstrates that the underlying finding of guilt or conviction of serious crimes has been reversed or vacated, the order for interim suspension is to be vacated and the practitioner be placed on active status unless the finding of guilt was reversed or the conviction was set aside with respect to less than all serious crimes for which the practitioner was found guilty or convicted. Vacating the interim suspension does not terminate any other disciplinary proceeding then pending against the practitioner, the disposition of which is determined by the hearing officer on the basis of all available evidence other than the finding of guilt or conviction. Section 11.25(e)(2) sets forth the reinstatement procedure for a practitioner convicted of a serious crime. The practitioner petitions for reinstatement under conditions set forth in § 11.60 no sooner than five years after being discharged following completion of service of his or her sentence, or after completion of service under probation or parole, whichever is later.

Section 11.25(f), which pertains to notifying clients and others of a practitioner's interim suspension, by providing that an interim suspension under this section constitutes a suspension of the practitioner for the purpose of § 11.58. Therefore, the practitioner must notify clients and others in accordance with § 11.58.

*Section 11.26:* Section 11.26 is added to introduce provisions for settlement in disciplinary matters. Under this section a settlement conference may occur between the OED Director and the practitioner before or after a complaint is filed under § 11.34. Any offers of compromise and any statements made during the course of settlement discussions are not admissible in subsequent proceedings. The OED Director may recommend to the USPTO Director any settlement terms deemed appropriate, including steps taken to correct or mitigate the matter forming the basis of the action, or to prevent recurrence of the same or similar conduct. A settlement agreement is effective only upon entry of a final decision by the USPTO Director.

*Section 11.27:* Section 11.27 is added to provide a procedure for excluding a practitioner on consent. Section 11.27(a) provides that a practitioner who is the subject of an investigation or a pending disciplinary proceeding based on allegations of grounds for discipline, and who desires to resign, may only do so by consenting to exclusion and delivering to the OED Director an affidavit declaring the consent of the practitioner to exclusion. The content of the affidavit is set forth in §§ 11.27(a)(1)(i) through 11.27(a)(3)(ii). Section 11.27(b) provides a procedure for the USPTO Director to review, and if appropriate, approve the exclusion on consent. Upon approval, the USPTO Director enters an order excluding the practitioner on consent and providing other appropriate actions. Upon entry of the order, the excluded practitioner must comply with the requirements set forth in § 11.58. Under § 11.27(c), when an affidavit under § 11.27(a) is received after a complaint under § 11.34 has been filed, the OED Director notifies the hearing officer. The hearing officer then enters an order transferring the disciplinary proceeding to the USPTO Director, who may enter an order excluding the practitioner on consent. Section 11.27(d) provides for reinstatement following exclusion on consent. Under this section, a practitioner excluded on consent under this section may not petition for reinstatement for five years. This section provides that an excluded practitioner who intends to reapply for admission to practice before the Office must comply with the provisions of § 11.58, and apply for reinstatement in accordance with § 11.60. This section provides that failure to comply with the provisions of § 11.58 constitutes grounds for denying an application for reinstatement.

*Section 11.28:* Section 11.28 is added to provide procedures for addressing disciplinary proceedings involving an incapacitated practitioner. Section 11.28(a) provides a procedure for holding a disciplinary procedure in abeyance because of a practitioner's incapacitation due to a current disability or addiction. Under § 11.28(a)(1), in the course of a disciplinary proceeding, before the date set for a hearing, the practitioner may file a motion requesting the hearing officer to enter an order holding such proceeding in abeyance based on the contention that the practitioner is suffering from a disability or addiction that makes it impossible for the practitioner to adequately defend the charges in the disciplinary proceeding. The required content of the motion is set forth in § 11.28(a)(1)(i). The time for filing and serving the OED Director's response, and the content of the response are set forth in § 11.28(a)(1)(ii). Section 11.28(a)(2) provides a procedure for disposition of the practitioner's motion. Upon granting the practitioner's motion, the OED Director transfers the practitioner to disability inactive status and publishes notice. The order may provide that, in the case of addiction to drugs or intoxicants, the practitioner will not be returned to active status absent satisfaction of specified conditions. Upon receipt of the order, the OED Director transfers the practitioner to disability inactive status, gives notice to the practitioner, causes notice to be published, and gives notice to appropriate authorities in the Office that the practitioner has been placed on

disability inactive status. The practitioner is required to comply with the provisions of § 11.58, and not engage in practice before the Office in patent, trademark and other non-patent law until a determination is made of the practitioner's capability to resume practice before the Office in a proceeding under §§ 11.28(c) or 11.28(d). A practitioner on disability inactive status must seek permission from the OED Director to seek employment authorized under § 11.58(e). Permission will be granted only if the practitioner has complied with all the conditions of §§ 11.58(a) through 11.58(d) applicable to disability inactive status. In the event that permission is granted, the practitioner must fully comply with the provisions of § 11.58(e).

Section 11.28(b) provides a procedure whereby a practitioner transferred to disability inactive status in a disciplinary proceeding may move for reactivation once a year beginning at any time not less than one year after the initial effective date of inactivation, or once during any shorter interval provided by the order issued pursuant to § 11.28(a)(2) or any modification thereof. If the motion is granted, the disciplinary proceeding is resumed under a schedule established by the hearing officer. Section 11.28(c) sets forth the content of the practitioner's motion for reactivation.

Section 11.28(d) provides a procedure whereby the OED Director may move to terminate a prior order holding a pending disciplinary proceeding in abeyance and resume a disciplinary proceeding. The OED Director bears the burden of showing by clear and convincing evidence that the practitioner is able to defend himself or herself, and the hearing officer will hold an evidentiary hearing if there is any genuine issue as to one or more material facts.

Section 11.28(e) provides for a hearing officer to take appropriate action if, in deciding a motion under § 11.28(b) or § 11.28(d), the hearing officer determines that there is good cause to believe the practitioner is not incapacitated from defending himself or herself, or is not incapacitated from practicing before the Office. The appropriate action may include entry of an order directing the reactivation of the practitioner and resumption of the disciplinary proceeding.

*Section 11.29:* Section 11.29 is added to provide for reciprocal transfer or initial transfer to disability inactive status of practitioners. Section 11.29(a) provides for notification of the OED Director. Section 11.29(a)(1) addresses transfer to disability inactive status in another jurisdiction as grounds for reciprocal transfer by the Office. Within thirty days of being transferred to disability inactive status in another jurisdiction a practitioner subject to the disciplinary jurisdiction of the Office is required to notify the OED Director in writing of the transfer. Upon notification from any source that a practitioner subject to the disciplinary jurisdiction of the Office has been transferred to disability inactive status in another jurisdiction, the OED Director is required to obtain a certified copy of the order and file it with the USPTO Director together with a request that the practitioner be transferred to disability inactive status, including the specific grounds therefor, and a request that the USPTO Director issue a notice and order as set forth in § 11.29(b).

Section 11.29(a)(2) sets forth as grounds for initial transfer to disability inactive status, situations where a practitioner has been involuntarily committed, there is an adjudication of incompetency, or there is a court-ordered placement of a practitioner under guardianship or conservatorship. Within thirty days of being judicially declared incompetent, being judicially ordered to be involuntarily committed after a hearing on the grounds of incompetency or disability, or being placed by court order under guardianship or conservatorship in another jurisdiction, a practitioner subject to the disciplinary jurisdiction of the Office must notify the OED Director in writing of the transfer. Upon notification from any source that a practitioner subject to the disciplinary jurisdiction of the Office has been transferred to disability inactive status in another jurisdiction, the OED Director is required to obtain a certified copy of the order and file it with the USPTO Director along with the requests described in 11.29(a)(1).

Section 11.29(b) provides for serving notice on a practitioner to show cause why transfer to disability inactive status should not occur. The OED Director issues the notice, comporting with § 11.35, directed to the practitioner upon receiving the information and requests from the OED Director. The notice contains a copy of the order or declaration from the other jurisdiction. The notice also contains an order directing the practitioner to inform the USPTO Director and OED Director, within 30 days from the date of the notice, a) his or her response to the OED Director's request to transfer to disability status which shall establish any genuine issue of material fact supported by affidavit based on the grounds set forth in § 11.29(d) (1) through (4) that the transfer to disability inactive status would be unwarranted and the reasons therefor.

Section 11.29(c) addresses the effect of stay of transfer or of a stay of a judicially declared incompetence, judicially ordered involuntary commitment on the grounds of incompetency or disability, or court-ordered placement under guardianship or conservatorship. This section provides that in the event the transfer, judicially declared incompetence, judicially ordered involuntary commitment on the grounds of incompetency or disability, or court-ordered placement under guardianship or conservatorship in the other jurisdiction has been stayed, any reciprocal transfer or transfer by the Office may be deferred until the stay expires.

Section 11.29(d) provides for a hearing and transfer to disability inactive status. The request for transfer to disability inactive status shall be heard by the USPTO Director on the documentary record unless the USPTO Director determines that there is a genuine issue of material fact, in which case the USPTO Director may deny the request. Upon the expiration of 30 days from the date of the notice pursuant to the provisions of § 11.29(b), the USPTO Director shall consider any timely filed response and impose the identical transfer to disability inactive status unless the practitioner demonstrates by clear and convincing evidence and the USPTO Director finds there is a genuine issue of material fact by clear and convincing evidence that: (1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; (2) there was such infirmity of proof establishing the transfer to disability status, judicial declaration of incompetence, judicial order for involuntary commitment on the grounds of incompetency or disability, or placement by court order under guardianship or conservatorship that the USPTO Director could not, consistent with the Office's duty, accept as final the conclusion on that subject; (3) the imposition of the same disability status or transfer to disability status by the USPTO Director would result in grave injustice; or (4) the practitioner is not the individual transferred to disability status, judicially declared incompetent, judicially ordered for involuntary commitment on the grounds of incompetency or disability, or placed by court order under guardianship or conservatorship.

One example that it would be a grave injustice to impose disability status or

transfer to disability status might be that the reason no longer exists for the original transfer to disability inactive status, judicial declaration of incompetence, judicial order to be involuntarily committed on the grounds of incompetency or disability, or placement by court order under guardianship or conservatorship. A further example would be that the practitioner was not the person transferred to disability inactive status, judicially declared incompetent, judicially ordered to be involuntarily committed on the grounds of incompetency or disability, or placed by court order under guardianship or conservatorship. If the USPTO Director determines that there is no genuine issue of material facts with regard to any of the elements of §§ 11.29 (d)(1) through (4), the USPTO Director shall enter an appropriate final order. If the USPTO Director is unable to make that determination because there is a genuine issue of material fact, the USPTO Director shall enter an appropriate order dismissing the OED Director's request for such reason.

Section 11.29(e) provides for the effect of adjudication in other jurisdictions. This section provides that in all other aspects, a final adjudication in another jurisdiction that a practitioner is transferred to disability inactive status, is judicially declared incompetent, is judicially ordered to be involuntarily committed on the grounds of incompetency or disability, or is placed by court order under guardianship or conservatorship establishes the disability for purposes of a reciprocal transfer to or transfer to disability status before the Office.

Section 11.29(f) provides that a practitioner who is transferred to disability inactive status under this section shall be deemed to have been refused recognition to practice before the Office so that the agency's final order may be reviewed under 35 U.S.C. 32.

Section 11.29(g) provides for an order imposing reciprocal transfer to disability inactive status or order imposing initial transfer to disability inactive status. Under this section, an order by the USPTO Director imposing reciprocal transfer to disability inactive status, or transferring a practitioner to disability inactive status is effective immediately for an indefinite period until further order of the USPTO Director. A copy of the order transferring a practitioner to disability inactive status is served upon the practitioner, the practitioner's guardian, and/or the director of the institution to which the practitioner has been committed in the manner the USPTO Director may direct. A practitioner reciprocally transferred or transferred to disability inactive status must comply with the provisions of § 11.58, and must not engage in practice before the Office in patent, trademark and other non-patent law unless and until reinstated to active status.

Section 11.29(h) provides for confidentiality of the proceeding and that orders transferring a practitioner to disability status be public. Under § 11.29(h)(1) all proceedings under § 11.29 involving allegations of disability of a practitioner are kept confidential unless and until the USPTO Director enters an order reciprocally transferring or transferring the practitioner to disability inactive status. Under § 11.29(h)(2), the OED Director must publicize any reciprocal transfer to disability inactive status or transfer to disability inactive status in the same manner as for the imposition of public discipline.

Section 11.29(i) addresses activities provided for under § 11.58(e) of practitioners on disability inactive status. A practitioner on disability inactive status must seek permission from the OED Director to engage in an activity authorized under § 11.58(e). Permission will be granted only if the practitioner has complied with all the conditions of §§ 11.58(a) through 11.58(d) applicable to disability inactive status. In the event that permission is granted, the practitioner must fully comply with the provisions of § 11.58(e).

Section 11.29(j) provides for reinstatement from disability inactive status. Section 11.29(j)(1) provides that no practitioner reciprocally transferred or transferred to disability inactive status under § 11.29 may resume active status except by order of the OED Director. Section 11.29(j)(2) provides that a practitioner reciprocally transferred or transferred to disability inactive status is entitled to petition the OED Director for transfer to active status once a year, or at whatever shorter intervals the USPTO Director may direct in the order transferring or reciprocally transferring the practitioner to disability inactive status or any modification thereof. Section 11.29(j)(3) provides that upon the filing of a petition for transfer to active status, the OED Director may take or direct whatever action is deemed necessary or proper to determine whether the incapacity has been removed, including a direction for an examination of the practitioner by qualified medical or psychological experts designated by the OED Director. The expense of the examination is paid and borne by the practitioner. Section 11.29(j)(4) provides that with the filing of a petition for reinstatement to active status, the practitioner will be required to disclose the name of each psychiatrist, psychologist, physician and hospital or other institution by whom or in which the practitioner has been examined or treated since the transfer to disability inactive status. The practitioner must furnish the OED Director with written consent for the release of information and records relating to the incapacity if requested by the OED Director. Section 11.29(j)(5) provides that the OED Director may direct that the practitioner establish proof of competence and learning in law, which proof may include passing the registration examination. Section 11.29(j)(6) provides that the OED Director shall grant the petition for transfer to active status upon a showing by clear and convincing evidence that the incapacity has been removed. Section 11.29(j)(7) provides that if a practitioner reciprocally transferred to disability inactive status on the basis of a transfer to disability inactive status in another jurisdiction, the OED Director may dispense with further evidence that the disability has been removed and may immediately direct reinstatement to active status upon such terms as are deemed proper and advisable. Section 11.29(j)(8) provides that if a practitioner transferred to disability inactive status on the basis of a judicially declared incompetence, judicially ordered involuntary commitment on the grounds of incompetency or disability, or court-ordered placement under guardianship or conservatorship has been declared to be competent, the OED Director may dispense with further evidence that the incapacity to practice law has been removed and may immediately direct reinstatement to active status.

*Sections 11.30 through 11.31:* Sections 11.30 through 11.31 are reserved.

*Section 11.32:* Section 11.32 is added to provide a procedure for instituting a disciplinary proceeding. Section 11.32, in essence, continues the provisions of former § 10.132, except as noted in the following discussion. Section 11.32(a) authorizes the OED Director to convene a meeting of ''a panel of the Committee on Discipline,'' as opposed to a ''meeting of the Committee on Discipline'' provided for in former § 10.132, and § 11.32(a) provides that the meeting may be convened after an investigation is conducted and after complying, where necessary, with the provisions of 5 U.S.C. 558(c), if ''the OED Director is of the opinion that grounds exist for discipline under

§ 11.19(b)(3)–(5).'' The panel of the Committee then determines as specified in § 11.23(b) whether a disciplinary proceeding shall be instituted.

*Section 11.33:* Section 11.33 is reserved.

*Section 11.34:* Section 11.34 is added to provide for the content and sufficiency of a complaint. Section 11.34, in essence, continues the provisions of former § 10.134, except as noted in the following discussion. Section 11.34(a)(2) provides that the complaint must give a plain and concise description of the respondent's ''alleged grounds for discipline'' instead of the ''alleged violations of the Disciplinary Rules by the practitioner'' found in former § 10.134(a)(2). Section 11.34(a)(3) adds a provision that the complaint state the time ''not less than thirty days from the date the complaint is filed'' for respondent to file an answer.

Section 11.34(b) provides that the complaint will be deemed sufficient if it fairly informs the respondent of ''any grounds for discipline, and where applicable, Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10 of this Subsection that form the basis for the disciplinary proceeding,'' whereas former § 10.134(b) provided that the complaint must fairly inform the respondent of ''any violation of the Disciplinary Rules which form the basis for the disciplinary proceeding.'' The reference to the Mandatory Disciplinary Rules of Part 10, instead of the imperative Rules of Professional Conduct, will obtain until such time as the Rules of Professional Conduct are adopted, at which time reference will be made to the imperative Rules of Professional Conduct. Section 11.34(c) adds a provision that ''[t]he complaint shall be filed in the manner prescribed by the USPTO Director.''

*Section 11.35:* Section 11.35 is added to provide for service of the complaint. Section 11.35, in essence, continues the provisions of former § 10.135, except as noted in the following discussion. Section 11.35(a)(2) provides for serving a complaint on a respondent by mailing a copy of the paper by ''other delivery service'' to respondent. The use of ''other delivery service that provides the ability to confirm delivery or attempted delivery,'' in addition to first class mail and ''Express Mail,'' recognizes additional delivery services not recognized when former § 10.135 was adopted. Section 11.35(a)(4) adds a provision for delivery of a complaint ''[i]n the case of a respondent who resides outside the United States, by sending a copy of the complaint by any delivery service that provides ability to confirm delivery or attempted delivery, to: (i) [a] respondent who is a registered practitioner at the address provided to OED pursuant to § 11.11; or (ii) [a] respondent who is a nonregistered practitioner at the last address for the respondent known to the OED Director.'' Unlike the provision of former § 10.135(b), § 11.35 does not require a second attempt to serve the complaint by any one of the procedures in § 11.35(a) before service is effected by publication. Section 11.35(b) provides for service by publication ''for two consecutive weeks,'' instead of the ''four consecutive weeks'' required by former § 10.135(b), and the time for filing an answer is set at ''thirty days from the second publication of the notice.'' Section 11.35(b) also provides that ''[f]ailure to timely file an answer will constitute an admission of the allegations in the complaint in accordance with paragraph (d) of § 11.36, and the hearing officer may enter an initial decision on default.'' Section 11.35(c), which addresses serving a copy of a complaint on the attorney known to represent a respondent, provides that service on the attorney is in lieu of service on the respondent in the manner provided for in sections 11.35(a) or (b).

Section 11.35(b) provides a procedure for accomplishing service if a copy of the complaint cannot be delivered to the respondent through any one of the procedures in § 11.35(a). In these circumstances, the OED Director serves the respondent by causing an appropriate notice to be published in the Official Gazette for two consecutive weeks, in which case, the time for filing an answer shall be thirty days from the second publication of the notice. Section 11.35(b) provides that failure to timely file an answer will constitute an admission of the allegations in the complaint in accordance with § 11.36(d), and the hearing officer may enter an initial decision on default.

Section 11.35(c) provides that if the respondent is known to the OED Director to be represented by an attorney under § 11.40(a), a copy of the complaint is to be served on the attorney in lieu of the respondent in the manner provided for in § 11.35(a) or § 11.35(b).

*Section 11.36:* Section 11.36 is added to provide for the respondent's answer to a complaint. Section 11.36, in essence, continues the provisions of former § 10.136, except as noted in the following discussion. Section 11.36(a) provides that the minimum thirty days for filing an answer runs ''from the date the complaint is filed.''

In § 11.36(b), the first sentence provides that when filing the answer with the hearing officer, it is to be filed ''at the address specified in the complaint.'' In § 11.36(c), the third sentence requires respondent to state affirmatively any intent to raise a disability as a mitigating factor. The last three sentences in § 11.36(c) provide: that ''if respondent intends to raise a special matter of defense or disability, the answer shall specify the defense or disability, its nexus to the misconduct, and the reason it provides a defense or mitigation''; that ''a respondent who fails to do so cannot rely on a special matter of defense or disability''; and that ''the hearing officer may, for good cause, allow the respondent to file the statement late, grant additional hearing preparation time, or make other appropriate orders.'' Disability, such as mental disability or chemical dependency, including alcoholism or drug abuse, would be a mitigating factor only if the respondent practitioner makes an adequate showing of nexus and mitigation. Such a showing would be expected to include (1) medical evidence that the practitioner is affected by a chemical dependency or mental disability; (2) evidence that the chemical dependency or mental disability substantially caused the misconduct; (3) the practitioner's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; (4) the recovery arrested the misconduct; and (5) recurrence of the misconduct is unlikely. These are substantially the same standards as those set forth Section 9.32(i) of the American Bar Association Standards for Imposing Lawyer Sanctions (1992). Section 11.36(d) provides that the hearing officer need receive no further evidence with respect to an allegation that is not denied by a respondent in the answer inasmuch as the allegation is deemed to be admitted and may be considered proven. Section 11.36(e) provides for entry of a default judgment if an answer is not timely filed.

*Section 11.37:* Section 11.37 is reserved.

*Section 11.38:* Section 11.38 is added to provide for a contested case. Section 11.38, in essence, continues the provisions of former § 10.138.

*Section 11.39:* Section 11.39 is added to provide for a hearing officer, the appointment and responsibilities of the hearing officer, and review of a hearing officer's interlocutory orders and stays. Section 11.39, in essence, continues the provisions of former § 10.139, except as noted in the following discussion. Section 11.39(a), in addition to providing for the appointment of a

hearing officer by the USPTO Director under 5 U.S.C. 3105, also provides for a hearing officer appointed under 35 U.S.C. 32. The hearing officer conducts the disciplinary proceedings.

Section 11.39(b) provides that the hearing officer be independent of improper influence by requiring that the officer ''not be subject to first level or second level supervision by the USPTO Director or his or her designee,'' ''not be subject to supervision of the person(s) investigating or prosecuting the case,'' ''not be an individual who has participated in any manner in the decision to initiate the proceedings,'' and ''not have been employed under the immediate supervision of the practitioner.'' The hearing officer must be admitted to practice law and have suitable experience and training to conduct the hearing, reach a determination, and render an initial decision in an equitable manner. Section 11.39(b)(11) authorizes the hearing officer to impose against a party any of the sanctions provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure in the event that said party or any attorney, agent or designated witness of that party fails to comply with a protective order made pursuant to § 11.44(c).

Section 11.39(c)(8) provides that the hearing officer has authority to adopt procedures and modify procedures for the orderly disposition of proceedings and sets forth a hearing officer's responsibilities. Section 11.39(c)(10) provides that the hearing officer has authority to promote not only the efficient and timely conduct of a disciplinary proceeding, but also to promote the impartiality of the proceeding.

Section 11.39(d) provides for the hearing officer issuing an initial decision ''normally* * * within nine months of the date a complaint is filed,'' instead of the six-month period used in former § 10.139(c). Section 11.39(d) provides for the initial decision issuing more than nine months after a complaint in the same circumstances contemplated by former § 10.139(c).

Section 11.39(f) provides that if the OED Director or a respondent seeks review of an interlocutory order of a hearing officer under § 11.39(b)(2), any time period set by the hearing officer for taking action shall not be stayed unless ordered by the USPTO Director or the hearing officer. The language appearing in proposed § 11.39(f), ''any time period set by the hearing officer for taking action shall not be stayed'' has been changed to ''any time period set by the hearing officer for taking action shall not be stayed.'' The hearing officer sets times for the OED Director and respondent to act under §§ 11.39(c)(5) and (c)(8), but not for the hearing officer to act. Accordingly, the language was changed sua sponte to conform to the hearing officer's recited responsibilities.

Section 11.39(g) prohibits the hearing officer from engaging in *ex parte* discussions with any party on the merits of the complaint, beginning with appointment and ending when the final agency decision is issued.

*Section 11.40* is added to provide for representation of the respondent and the OED Director. Section 11.40(a), in essence, continues the provisions of former § 10.140(a). Section 11.40(b) provides for the OED Director to be represented by the Deputy General Counsel for Intellectual Property and Solicitor, and attorneys in the Office of the Solicitor. The attorneys representing the OED Director in disciplinary proceedings must not consult with the USPTO Director, the General Counsel, or the Deputy General Counsel for General Law regarding the proceeding. The General Counsel and the Deputy General Counsel for General Law must remain screened from the investigation and prosecution of all disciplinary proceedings in order that they be available as counsel to the USPTO Director in deciding disciplinary proceedings, unless access is appropriate to perform their duties. After a final decision is entered in a disciplinary proceeding, the OED Director and attorneys representing the OED Director shall be available to counsel the USPTO Director, the General Counsel, and the Deputy General Counsel for General Law in any further proceedings, for example, as they arise in a United States District Court or the United States Court of Appeals for the Federal Circuit.

*Section 11.41:* Section 11.41 is added to provide for filing of papers. Section 11.41, in essence, continues the provisions of former § 10.141 except as noted in the following discussion. The first sentence of § 11.41(a) provides that the provisions of not only § 1.8, but also § 2.197, do not apply to disciplinary proceedings. The first sentence of former § 10.141 has been moved to be the second sentence of § 11.41(a). Section 11.41(b) provides that all papers filed after entry of an initial decision by the hearing officer are to be filed with the USPTO Director and that a copy of the paper shall be served on the OED Director. The provision of former § 10.141(c) has been moved to be the third sentence of § 11.41(b).

*Section 11.42:* Section 11.42 is added to provide for service of papers other than a complaint in a disciplinary proceeding. Section 11.42, in essence, continues the provisions of former § 10.142 except as noted in the following discussion. Sections 11.42(a)(2) and 11.42(b)(2) provide for serving a paper on the respondent's attorney, or upon a respondent who is not represented, by mailing a copy of the paper by ''other delivery service'' to the attorney or the respondent. The use of ''other delivery service,'' in addition to first class mail and ''Express Mail,'' recognizes additional delivery services not recognized when former § 10.142 was adopted. Similarly, § 11.42(c)(2) provides for the respondent serving a paper on the representative of the OED Director by mailing a copy by ''other delivery service.''

*Section 11.43:* Section 11.43 is added to provide for motions. In essence, § 11.43 continues the provisions of former § 10.143.

*Section 11.44:* Section 11.44 is added to provide for hearings in disciplinary proceedings. Except as noted in the following discussion, § 11.44, in essence, continues the provisions of former § 10.144. The third sentence of § 11.44(a) provides that the hearing officer will set the time and place for the hearing. In doing so, the hearing officer should normally give preference to a Federal facility in the district where the Office's principal office is located or Washington, DC, inasmuch as the practitioner is practicing before the Office. Nevertheless, the hearing officer should also give due regard to the convenience and needs of the parties, witnesses, or their representatives. The fifth sentence of § 11.44(a) provides that in cases involving an incarcerated respondent, any necessary oral hearing may be held at the location of incarceration. The seventh sentence of § 11.44(a) provides that the hearing be conducted as if the proceeding were subject to 5 U.S.C. 556. In some instances, such as when the OED Director and respondent reach a settlement, an oral hearing is unnecessary, and therefore, no oral hearing is conducted. The eighth sentence of § 11.44(a) provides that a copy of the transcript shall be provided to the OED Director and the respondent at the expense of the Office.

Section 11.44(b) provides that when the respondent to a disciplinary proceeding fails to appear at the hearing after a notice of hearing has been given by the hearing officer, the hearing officer may deem the respondent to have waived the right to a hearing and may proceed with the hearing in the absence of the respondent.

Section 11.44(c) provides that a hearing under this section will not be

open to the public except that the hearing officer may grant a request by a respondent to open his or her hearing to the public and make the record of the disciplinary proceeding available for public inspection, *provided,* a protective order is entered to exclude from public disclosure information which is privileged or confidential under applicable laws or regulations.

*Section 11.45:* Section 11.45 is added to provide for amendment of pleadings. This section permits the OED Director to amend the complaint to include additional charges with the authorization of the hearing officer, but without authorization from the Committee on Discipline. The amended charges may be based upon conduct committed before or after the complaint was filed. If amendment of the complaint is authorized, the hearing officer must authorize amendment of the answer. To avoid prejudice by the amendments to any party, reasonable opportunity is given to meet the allegations in the complaint or answer as amended, and the hearing officer makes findings on any issue presented by the complaint or answer as amended.

*Sections 11.46–11.48:* Sections 11.46–11.48 are reserved.

*Section 11.49:* Section 11.49 is added to provide each party's burden of proof. This section, in essence, continues the provisions of former § 10.149.

*Section 11.50:* Section 11.50 is added to provide for applicable rules of evidence. This section, in essence, continues the provisions of former § 10.150.

Section 11.50(c), which provides for discovery of government documents, in essence, continues the provisions for former § 10.150(c) and further specifies that the discovery ''include[es], but [is] not limited to, all papers in the file of a disciplinary investigation,'' which are admissible without extrinsic evidence of authenticity.

*Section 11.51:* Section 11.51 is added to provide for the use of depositions. Except as noted in the following discussion, § 11.51, in essence, continues the provisions of former § 10.151. The last sentence in § 11.51(a), ''[d]epositions may not be taken to obtain discovery, except as provided for in paragraph (b) of this section,'' is not found in former § 10.151, and has been added to § 11.51(a) to preclude the use of depositions to obtain discovery that the hearing officer has not authorized.

*Section 11.52:* Section 11.52 provides for discovery. Except as noted in the following discussion, § 11.52, in essence, continues the provisions of former § 10.152. Section 11.52, like former § 10.152, requires a party to establish that discovery is reasonable and relevant. However, § 11.52 does not specify that the party seeking discovery must do so ''in a clear and convincing manner.'' It is sufficient that the party establish that discovery is reasonable and relevant. Section 11.52(b)(1), unlike former § 10.152(b), does not prohibit reasonable and relevant discovery that will be used solely for cross-examination.

*Section 11.53:* Section 11.53, which provides for proposed findings and conclusions as well as post-hearing memorandum, in essence continues the provisions of former § 10.153.

*Section 11.54:* Section 11.54 provides for proposed findings and conclusions as well as post-hearing memoranda. Except as noted in the following discussion, § 11.54, in essence, continues the provisions of former § 10.154. To codify long-standing practice, § 11.54(a)(2) adds a provision specifically referencing inclusion of ''an order of default judgment'' in the decision, and for the hearing officer to transmit the entire record to the OED Director after issuing the decision. To improve efficiencies, § 11.52(a)(2) provides for the hearing officer to transmit a copy of the decision to the OED Director, instead of transmitting copies to both the OED Director and the OED Director's representative. To conform with the inclusion of ''an order of default judgment'' in the decision, the last sentence of § 11.52(a)(2) also provides that in the absence of an appeal to the USPTO Director, the decision of the hearing officer, including a default judgment, will, without further proceedings, become the decision of the USPTO Director thirty days from the date of the decision of the hearing officer. Section 11.54(b) provides that in determining any sanction after a finding that a practitioner has violated a ground for discipline, the following four factors must be considered if they are applicable: (1) Whether the practitioner has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the practitioner acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the practitioner's misconduct; and (4) the existence of any aggravating or mitigating factors.

*Section 11.55:* Section 11.55 is added to provide a procedure for appealing a decision to the USPTO Director. While § 11.55, in essence, continues a number of the provisions of former § 10.155, numerous provisions have been added to clarify and codify procedures. For example, beginning with the second sentence, § 11.55(a) provides: that the ''appeal shall include the appellant's brief;'' that ''[i]f more than one appeal is filed, the party who files the appeal first is the appellant for purpose of this rule;'' ''[i]f appeals are filed on the same day, the respondent is the appellant;'' ''[i]f an appeal is filed, then the OED Director shall transmit the entire record to the USPTO Director;'' that ''[a]ny cross-appeal shall be filed within fourteen days after the date of service of the appeal pursuant to § 11.42, or thirty days after the date of the initial decision of the hearing officer, whichever is later;'' that ''[t]he cross-appeal shall include the cross-appellant's brief;'' that ''[a]ny appellee or cross-appellee brief must be filed within thirty days after the date of service pursuant to § 11.42 of an appeal or cross-appeal;'' and that ''[a]ny reply brief must be filed within fourteen days after the date of service of any appellee or cross-appellee brief.''

Section 11.55(b) provides that an appeal or cross-appeal must include exceptions to the decisions of the hearing officer and supporting reasons for those exceptions, and that any exception not raised will be deemed to have been waived and will be disregarded by the USPTO Director in reviewing the initial decision.

Section 11.55(c) provides specific information regarding where briefs are filed, the content and arrangement of briefs, and paper size. Section 11.55(d) sets page limit lengths for briefs, as well as other requirements. Section 11.55(e) provides that the USPTO Director may refuse entry of a nonconforming brief. Section 11.55(g) proscribes filing further briefs or motions unless permitted by the USPTO Director. Section 11.55(i) provides that in the absence of an appeal by the OED Director, failure by the respondent to appeal under the provisions of this section shall be deemed to be both acceptance by the respondent of the initial decision and waiver by the respondent of the right to further administrative or judicial review.

*Section 11.56:* Section 11.56 is added to provide for a decision of the USPTO Director. Section 11.56, in essence, continues the provisions of former § 10.156, except as noted in the following discussion. The second sentence of § 11.56(a) provides that the USPTO Director may, in addition to affirming, reversing or modifying the initial decision of the hearing officer, ''remand the matter to the hearing officer for such further proceedings as the USPTO Director may deem appropriate.''

Section 11.56(b) provides that the final decision of the USPTO Director

may, in addition to the actions authorized in former § 10.156(b), reverse or modify the initial decision. This section also provides that a ''final decision suspending or excluding a practitioner shall require compliance with the provisions of § 11.58;'' and that the ''final decision may also condition the reinstatement of the practitioner upon a showing that the practitioner has taken steps to correct or mitigate the matter forming the basis of the action, or to prevent recurrence of the same or similar conduct.''

Section 11.56(c) adds several provisions not set forth in former § 10.156. The respondent and the OED Director are limited to making a single request for reconsideration or modification of the decision by the USPTO Director, and the request must be filed within twenty days from the date of entry of the decision. No request for reconsideration or modification will be granted unless the request is based on newly discovered evidence or error of law or fact, and the requester must demonstrate that any newly discovered evidence could not have been discovered any earlier by due diligence. The request has the effect of staying the effective date of the order of discipline in the final decision. The decision by the USPTO Director is effective on its date of entry.

*Section 11.57:* Section 11.57 is added to provide for review of the final decision of the USPTO Director. Section 11.57, in essence, continues the provisions of former § 10.157, except as noted in the following discussion. Section 11.57(a) provides that review of final decisions of the USPTO Director is available by petition filed in the United States District Court for the District of Columbia in accordance with the court's local rule. Section 11.57(a) draws the practitioner's attention to the necessity of serving the USPTO Director and complying with service requirements of Rule 4 of the Federal Rules of Civil Procedure and 37 CFR 104.2.

Section 11.57(b), unlike former § 10.156(b), provides that except for a request for reconsideration in § 11.56(c), ''an order for discipline in a final decision will not be stayed except on proof of exceptional circumstances.''

*Section 11.58:* Section 11.58 is added to set forth the duties of a disciplined or resigned practitioner. Section 11.58, in essence, continues the provisions of former § 10.158, except as noted in the following discussion. Section 11.58, in addition to referring to a practitioner who is excluded or suspended, also refers to practitioners who have resigned. Practitioners who resign are those addressed in § 11.11(e). Section 11.58(a) provides that an excluded, suspended or resigned practitioner will not be automatically reinstated at the end of his or her period of exclusion or suspension, that they must comply with the provisions of this section and §§ 11.12 and 11.60 to be reinstated, and that failure to comply with the provisions of this section may constitute both grounds for denying reinstatement or readmission and be cause for further action, including seeking further exclusion, suspension, and for revocation of any pending probation.

Section 11.58(b)(1)(i) requires the practitioner to file, within thirty days after the date of entry of the order of exclusion, suspension, or acceptance of resignation, a notice of withdrawal as of the effective date of the exclusion, suspension or acceptance of resignation in each pending patent and trademark application, each pending reexamination and interference proceeding, and every other matter pending in the Office, together with a copy of the notices sent pursuant to sections 11.58(b) and 11.58(c).

Section 11.58(b)(1)(iii) requires that the practitioner give notice to state and Federal jurisdictions and administrative agencies to which the practitioner is admitted to practice and clients ''of the practitioner's consequent inability to act as a practitioner after the effective date of the order; and that, if not represented by another practitioner, the client should act promptly to substitute another practitioner, or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case.'' Section 11.58(b)(1)(iii) requires practitioners to ''provide notice to the practitioner(s) for all opposing parties (or, to the parties in the absence of a practitioner representing the parties) in matters pending before the Office of the practitioner's exclusion, suspension or resignation and, that as a consequence, the practitioner is disqualified from acting as a practitioner regarding matters before the Office after the effective date of the suspension, exclusion or resignation, and state in the notice the mailing address of each client of the excluded, suspended or resigned practitioner who is a party in the pending matter.''

Section 11.58(b)(1)(iv) requires the practitioners to ''deliver to all clients having immediate or prospective business before the Office in patent, trademark or other non-patent matters any papers or other property to which the clients are entitled, or shall notify the clients and any co-practitioner of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property.''

Section 11.58(b)(1)(v) requires practitioners to ''relinquish to the client, or other practitioner designated by the client, all funds for practice before the Office, including any legal fees paid in advance that have not been earned and any advanced costs not expended.''

Section 11.58(b)(1)(vii) requires practitioners to ''serve all notices required by paragraphs (b)(1)(ii) and (b)(1)(iii) of this section by certified mail, return receipt requested, unless mailed abroad. If mailed abroad, all notices shall be served with a receipt to be signed and returned to the practitioner.''

Section 11.58(b)(2) provides that within forty-five days after entry of the order of suspension, exclusion, or of acceptance of resignation, the practitioner must file with the OED Director an affidavit of compliance certifying that the practitioner has fully complied with the provisions of the order, § 11.58, and with Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10 for withdrawal from representation. Appended to the affidavit of compliance must be copies of specified documents, a schedule regarding bank accounts in which the practitioner holds or held as of the entry date of the order any client, trust, or fiduciary funds for practice before the Office, a schedule describing the practitioner's disposition of all client and fiduciary funds for practice before the Office, proof of proper distribution of the funds and closing of the accounts, a list of all other state, Federal and administrative jurisdictions to which the practitioner is admitted to practice, and an affidavit providing information specified in § 11.58(b)(2)(vi).

Section 11.58(c) provides that after entry of the order of exclusion or suspension, or acceptance of resignation, the practitioner is proscribed from accepting any new retainer regarding immediate or prospective business before the Office, or engaging as a practitioner for another in any new case or legal matter regarding practice before the Office. The practitioner will be granted limited recognition for a period of thirty days. During the thirty-day period of limited recognition, the practitioner is to conclude work on behalf of a client on any matters that were pending before the Office on the date of entry of the order of exclusion or suspension, or acceptance of resignation. If such work cannot be concluded, the practitioner must so advise the client so that the client may make other arrangements.

Section 11.58(d) requires the practitioner to keep and maintain records of the various steps taken under § 11.58 so that proof of compliance with this section and with the exclusion or suspension order will be available in any subsequent proceeding. The OED Director will require the practitioner to submit such proof as a condition precedent to the granting of any petition for reinstatement.

Section 11.58(e) continues the practice under former § 10.158(c) for an excluded and suspended practitioner to act as a paralegal for another practitioner, and extending the practice to resigned practitioners and practitioners on disability inactive status.

Section 11.58(f) continues the practice under former § 10.158(d) proscribing reinstatement of excluded and suspended practitioners who act as a paralegal or perform services under § 11.58(e) unless they satisfy specified conditions, and extends the practice to resigned practitioners and practitioners on disability inactive status.

*Section 11.59:* Section 11.59 is added to improve information dissemination to protect the public from disciplined practitioners. Section 11.59(a) provides for informing the public of the disposition of each matter in which public discipline has been imposed and of any other changes in a practitioner's registration status. Public discipline is identified as exclusion, including exclusion on consent, suspension, and public reprimand. In the usual circumstances, the OED Director would give notice of public discipline and the reasons for the discipline to disciplinary enforcement agencies in the state where the practitioner is admitted practice, to courts where the practitioner is known to be admitted, and the public. The final decision of the USPTO Director would be published if public discipline is imposed. A redacted version of the final decision would be published if a private reprimand is imposed. Changes in status, such as suspended, excluded, or disability inactive status, would also be published.

Section 11.59(b) provides that the OED Director's records of every disciplinary proceeding where a practitioner is reprimanded, suspended, or excluded, including when said sanction is imposed by default judgment, shall be made available to the public upon written request, unless the USPTO Director orders that the proceeding or a portion of the record be kept confidential. This section further provides that information may be withheld as necessary to protect the privacy of third parties or as directed in a protective order issued pursuant to § 11.44(c). This section also provides that the record of a proceeding that results in a practitioner's transfer to disability inactive status shall not be available to the public.

Section 11.59(c) provides that an order excluding a practitioner on consent under § 11.27 and the affidavit required under paragraph (a) of § 11.27 shall be available to the public unless the USPTO Director orders that the proceeding or a portion of the record be kept confidential. The section also provides that information in the order and affidavit may be withheld as necessary to protect the privacy of third parties or as directed in a protective order under § 11.44(c)(2). This section also provides that the affidavit required under § 11.27(a) shall not be used in any other proceeding except by order of the USPTO Director or upon written consent of the practitioner.

*Section 11.60:* Section 11.60 is added to address petitions for reinstatement by excluded, suspended or resigned practitioners. Section 11.60 continues the practices of former § 10.160, except as noted in the following discussion. In addition to referencing suspended and excluded practitioners throughout the section, as did former § 10.160, § 11.60 also specifically references and applies the provisions to a resigned practitioner. Section 11.60(a) prohibits the practitioners from resuming the practice of patent, trademark, or other non-patent law before the Office until reinstated by order of the OED Director or the USPTO Director.

Section 11.60(b) provides that excluded or suspended practitioners are eligible to apply for reinstatement only upon expiration of the period of suspension or exclusion and the practitioner's full compliance with § 11.58. An excluded practitioner can be eligible to apply for reinstatement no earlier than at least five years from the effective date of the exclusion. The section also provides that a resigned practitioner can be eligible to petition for reinstatement and must show compliance with § 11.58 no earlier than at least five years from the date the practitioner's resignation is accepted and an order is entered excluding the practitioner on consent.

Section 11.60(c) provides for filing a petition for reinstatement with the OED Director accompanied by the fee required by § 1.21(a)(10). A practitioner who has violated any provision of § 11.58 is not eligible for reinstatement until a continuous period of the time in compliance with § 11.58 that is equal to the period of suspension or exclusion has elapsed. A resigned practitioner is not eligible for reinstatement until compliance with § 11.58 is shown. If a practitioner who is not eligible for reinstatement files a petition, or if the petition is insufficient or defective on its face, the OED Director may dismiss the petition. Otherwise the OED Director considers the petition for reinstatement. The practitioner seeking reinstatement has the burden of proof by clear and convincing evidence. The evidence must be included in or accompany the petition. The evidence must establish: that the practitioner has the good moral character and reputation, competency, and learning in law required under § 11.7 for admission; that resumption of practice before the Office will not be detrimental to the administration of justice or subversive to the public interest; and that the practitioner has complied with the provisions of § 11.58 for the full period of the suspension, or at least five years if the practitioner resigned or was excluded.

Section 11.60(d)(1) provides for the OED Director to grant a petition for reinstatement where the practitioner has complied with §§ 11.60(c)(1) through (c)(3) by entering an order for reinstatement conditioned on payment of the costs of the disciplinary proceeding to the extent set forth in § 11.60(d)(2). Section 11.60(d)(3) provides for granting relief, in whole or part, from an order assessing costs on grounds of hardship, special circumstances, or other good cause. Good cause may include, for example, the disciplinary proceeding costs in excess of $1,500 incurred by the practitioner were not anticipated because the disciplinary proceeding began before the effective date of these rules and concluded thereafter. Under the old rules, the maximum cost that could be recovered was $1,500.

Section 11.60(e) provides that where the OED Director finds the practitioner is unfit to resume the practice of patent law before the Office, the practitioner is first provided with an opportunity to show cause in writing why the petition should not be denied. If unpersuaded by the practitioner's showing, the OED Director must deny the petition. The OED Director may require the practitioner, in meeting the requirements of § 11.7, to take and pass an examination under § 11.7(b), ethics courses, and/or the Multistate Professional Responsibility Examination. The OED Director must provide findings, together with the record. The findings must include specified information regarding ''Prior Proceedings.''

Section 11.60(f) provides for resubmission of petitions for reinstatement if a petition for reinstatement is denied. A petition for reinstatement may not be resubmitted until the expiration of at least one year following the denial unless the order of denial provides otherwise.

*Section 11.61:* Section 11.61 is added to provide savings clauses and continues the current practice under former § 10.161, except as discussed below. Section 11.61(c) provides that sections 11.24, 11.25, 11.28 and 11.34 through 11.57 apply to all proceedings in which the complaint is filed on or after the effective date of these regulations. Section 11.61(c) also provides that §§ 11.26 and 11.27 apply to matters pending on or after the effective date of these regulations. Section 11.61(d) provides that sections 11.58 through 11.60 apply to all cases in which an order of suspension or exclusion is entered or resignation is accepted on or after the effective date of these regulations.

*Sections 11.62—11.99.* Sections 11.62–11.99 are reserved.

*Section 41.5:* Section 41.5(e) would be revised to change a cross-reference to § 11.22.

Response to comments: The Office published a notice proposing changes to the Office's rules governing disciplinary proceedings for attorneys, registered patent agents and persons granted limited recognition to practice before the Office. See *Changes to Representation of Others Before the United States Patent and Trademark Office*; Notice of proposed rule making, 68 FR 69442 (Dec. 12, 2003), 1278 *Off. Gaz. Pat. Office* 22 (Jan. 6, 2004) (proposed rule). The Office received one hundred forty-seven comments (from intellectual property organizations and patent practitioners) in response to this notice. The Office thereafter published a supplemental notice of proposed rule making for the rules governing disciplinary proceedings. See *Changes to Representation of Others Before The United States Patent and Trademark Office*, Supplemental Notice of Proposed Rule Making, 72 FR 9196 (Feb. 28, 2007), 1316 *Off. Gaz. Pat. Office* 123 (Mar. 27, 2007) (supplemental proposed rule). The Office received fourteen comments (from intellectual property organizations and patent practitioners) in response to this notice. The Office's responses to the comments follow:

*Comment 1:* Two comments suggested that the word ''add'' in the instructions for the amendment to § 11.1 be changed to ''revise'' inasmuch as a definition of ''State'' was contained in the section in the rules adopted June 24, 2004.

Response: The suggestion in the comment has been adopted.

*Comment 2:* A comment inquired as to the meaning of ''other proceedings'' in § 11.2(c), and suggested that the rule either permit the Director to stay other proceedings or to stay the proceedings based on good and sufficient reasons presented by a prospective registrant in a petition.

Response: The suggestion has not been adopted. This section, like § 1.181(f), makes clear that the filing of a petition does not operate to stay any other proceeding. Thus, a petition by an applicant for registration who has paid the $1600 application fee and is seeking review of the decision requiring the payment, would not stay another proceeding in the Office regarding the same applicant, such as the processing of the individual's application to take the registration examination. No rule is believed necessary to enable the OED Director, where appropriate, to coordinate other proceedings within the OED Director's jurisdiction.

*Comment 3:* Two comments suggested that clarification is required regarding whether a fee is needed for a petition under § 11.2(e).

Response: No clarification is believed necessary. Section 11.2(e) does not provide for or otherwise refer to a fee to invoke the supervisory authority of the USPTO Director in appropriate circumstances in a disciplinary matter. Therefore, no fee for the petition is required in disciplinary matters.

*Comment 4:* One comment, after noting that § 11.3 as revised to eliminate a prohibition against petitioning to waive a disciplinary rule and the explanation for the revision, suggested the elimination of provisions in § 11.3 for suspensions of the rules.

Response: The disciplinary rules containing the ethical standards of practice for practitioners will be only one of several subjects addressed in Part 11. Part 11 currently includes, *inter alia,* rules addressing registration to practice, rules addressing investigations and rules for disciplinary procedures. Section 11.3 in Part 11, like § 1.183 in Part 1, provides both a procedure for requesting suspension of a rule, and a standard upon which the decision is made.

*Comment 5:* A comment noted that § 11.3 no longer provides immunity for complainants, witnesses, and disciplinary counsel, that the lack of immunity is contrary to longstanding policy found in Rule 12 of the Model Rules of Lawyer Disciplinary Enforcement for the reasons explained in the Commentary to Rule 12, and recommended that this section provide absolute immunity for complainants, witnesses and OED personnel.

Response: While we appreciate the provisions of Rule 12 of the Model Rules of Lawyer Disciplinary Enforcement and the expressed reasons for providing immunity, it is beyond the authority of the USPTO Director to provide immunity by rule. For example, as discussed below regarding § 11.18, all persons filing written communications with the Office, including complainants, are subject to the provisions of 18 U.S.C. 1001. The Office cannot provide complainants with immunity from violation of a criminal law.

*Comment 6:* One comment observed that the first sentence of § 11.5 could be construed to imply that preparation and prosecution privileges do not encompass practice before the Board of Patent Appeals and Interferences inasmuch as an ex parte proceeding before the Board arguably is not prosecution of a patent application. The comment suggested revising the language to read ''including representing applicants in patent matters before the Board of Patent Appeals and Interferences.''

Response: The suggestion to revise § 11.5(a) is adopted in part. In the first sentence, the word ''applications'' has been changed to ''matters,'' and the sentence now provides for keeping a register of the names of attorneys and agents who are ''recognized as entitled to represent applicants having prospective or immediate business before the Office in the preparation and prosecution of patent matters.'' The change is inclusive of representing applicants before the Board of Patent Appeals and Interferences in a patent matter.

*Comment 7:* Two comments suggested that ''or retaining'' be added after ''employing'' in the last sentence of § 11.5(b). One comment pointed out that the addition conforms to Rule 5.3(a) of the American Bar Association's Rules of Professional Conduct. The other comment pointed out that a practitioner may retain, as opposed to employ, a non-practitioner assistant, under the supervision of the practitioner to prepare presentations to the Office.

Response: The suggestion to add ''or retaining'' after ''employing'' in the last sentence of § 11.5(b) has been adopted.

*Comment 8:* Two comments presented similar suggestions for replacement of the phrase ''in preparation of said presentations'' in the last sentence of § 11.5(b). One comment suggested replacing the phrase with ''in matters pending or contemplated to be presented before the Office''; the other suggested using ''matters pending or

contemplated to be presented to the Office.'' Both comments suggested the change would more accurately define the activities and be consistent with other language in this section. A third comment suggested the non-practitioner should be broadened to include a person or entity which is not technically the practitioner's employee or on the practitioner's payroll, and who may be an independent contractor who communicates or consults with a client in working with a practitioner.

Response: The two similar suggestions for replacement of the phrase ''in preparation of said presentations'' have been adopted by replacing phrase with ''matters pending or contemplated to be presented to the Office'' in the last sentence of § 11.5(b).

The suggestion to broaden the non-practitioner to include a person or entity which is not technically the practitioner's employee or on the practitioner's payroll to communicate or consult with clients working for the practitioner has not been adopted. The persons and entities would not be subject to a practitioner's supervision, and absent supervision or other controls, could be engaged in the unauthorized practice of law by providing unsupervised and incorrect legal advice. The Office's Disciplinary Rules prohibit a practitioner from aiding another in the unauthorized practice of law. See 37 CFR 10.47. Persons or entities engaging in the unauthorized practice of law will be reported to the authorities in the appropriate jurisdiction(s). See § 11.19(d). The persons and entities contemplated by the suggestion are beyond the ambit of the Office's Disciplinary Rules. Under the suggestion, the practitioners have no supervisory authority over the persons or entities, and therefore could violate the Disciplinary Rules for non-supervision or aiding unauthorized practice of law. Thus, the Office could not protect the public from the actions of the persons or entities, though Congress has made the USPTO Director responsible for protecting the public from the misdeeds of those who practice before the Office.

*Comment 9:* One comment urged that § 11.5 places unnecessary and improper restrictions on practitioners who may work with non-practitioner invention developers who communicate or consult with clients who may want to file documents with the Office. The comment said it is unreasonable and improper for the Office to interfere with the relationship between invention promoters and practitioners by restricting practitioners from working with non-practitioners, including invention promoters who may consult or communicate with clients regarding their inventions, so long as legal advice and the filing of patent applications, attending hearings, etc. remain the responsibility of the practitioner. The comment suggested changes to § 11.5 to eliminate the following ''overly broad'' language: law-related services ''that comprehend[] any matter connected with the presentation to the Office,'' the preparation of necessary documents ''in contemplation of filing the documents'' with the Office, and ''communicating with * * * a client concerning matters pending or contemplated to be presented before the Office'' in § 11.5(b); ''consulting with * * * a client in contemplation of filing a patent application or other document with the office'' in § 11.5(b)(1). The comment urged that a person who may have prospective business before the Office may want to utilize both lay and legal service providers in connection with his invention, including non-practitioners who merely assemble information to provide non-legal services at a much lower cost than practitioners would charge.

Response: The Office disagrees that § 11.5 places unnecessary and improper restrictions on practitioners who may work with non-practitioners who communicate or consult with clients. Nothing in the rule prevents a person having prospective business before the Office from utilizing both lay and legal service providers in connection with that person's invention. Non-practitioners who assemble information to provide only non-legal services at a cost may continue to provide non-legal services. However, non-practitioners who, for example, provide law-related services ''that comprehend[] any matter connected with the presentation to the Office'' or prepare necessary documents, such as patent applications, ''in contemplation of filing the documents'' with the Office must be employed or retained by the practitioner and under the practitioner's supervision. The suggestion to change the language of § 11.5 to enable non-practitioners to consult or communicate with clients regarding their inventions, and enable clients to obtain services at lower cost than practitioners can provide has not been adopted. Contrary to the comment, assembly of information is not always a non-legal service; for example, providing a list of patent references found in a search of the prior art is a non-legal service whereas transmitting information to the practitioner to use to describe the invention in a patent application is a legal service. The value of competent legal service and advice, including communications, consultations, and assembly of information for inventors can be significantly more valuable than its cost. Its value may be more significant for unsophisticated inventors who need expert evaluation of the merits or real prospects of legal protection for their invention. The Office ''frequently finds itself challenged by so-called 'invention promoters' who exploit unsophisticated inventors, heap every invention with praise regardless of the merits or the real prospects of legal protection, and entice inventors into engagement agreements filled with hollow guarantees of patent protection and promises of royalty-bearing licenses that seldom yield anything of any significant value.'' *Bender* v. *Dudas,* 490 F.3d 1361, 1363 (Fed Cir. 2007). A practitioner working with an unsupervised non-practitioner facilitates such practices. For example, in *Bender,* the Court found ''[a]t no point did Gilden [a practitioner] consult with the inventors regarding the filing of a design patent application or the embellished drawings.'' *Id.* at 1364. At a minimum, it is necessary that the practitioner representing the client not only consult with the client, but also that the consultation ''otherwise advise[] that inventor on how best to proceed in his or her particular case.'' *Id.* at 1365. Non-practitioners are not entitled to provide legal advice or otherwise practice law. To the extent practice of law includes a law-related service that comprehends any matter connected with the presentation to the Office, the preparation of necessary documents in contemplation of filing the documents with the Office, and communicating with * * * a client concerning matters pending or contemplated to be presented before the Office as in § 11.5(b), a practitioner authorized by relevant law must provide the legal services. For example, consultation with a client in contemplation of filing a patent application or other document with the Office as in § 11.5(b)(1) requires a registered practitioner to provide the services. A practitioner may not circumvent the Disciplinary Rules through the actions of another. See 37 CFR 10.23(b)(2). For example, a non-practitioner who is neither employed nor retained by the practitioner, or who is not under the supervision of the practitioner, may not assist the practitioner in matters pending or contemplated to be presented to the Office.

*Comment 10:* Several comments responded to the Office's inquiry

whether the rules ''should explicitly provide for circumstances in which a patent agent's causing an assignment to be executed might be appropriate incidental to preparing and filing an application.'' Two comments pointed out that § 11.5(b)(1) would be internally inconsistent if patent agents could provide advice about ''alternative forms of protection that may be available under state law'' but not prepare and file assignments in connection with the applications they have prepared. One comment suggested that the Office lacks the authority to, and should not, prohibit a patent agent or registered patent attorney licensed only by the Office from preparing an assignment for an application he or she is prosecuting, while another comment recommended that the rule explicitly provide for preparing assignments and licenses for patent applicants and patentees. One comment said that it has been the Office's position that a registered patent agent could both prepare a patent assignment or license if not prohibited by state law and submit the assignment or license for recordation, and recommended that this position be explicitly stated in the rules. The comment also urged that the rule follow the practice of states that permit paraprofessionals, such as patent agents to complete and modify assignment and license documents under an attorney's supervision. The comment pointed out that allowing these types of activities is particularly important in a corporate environment where only one or two form agreements may be used in certain clearly defined situations. One comment suggested it is unnecessary for the Office to explicitly provide for appropriate circumstances when a patent agent may prepare an assignment and/or cause an assignment to be executed not only because these activities are incidental to the preparation and prosecution of patent applications or incidental to the record for an issued patent, but also because of the Office's long-standing position a registered patent agent may prepare a patent assignment and cause such assignment to be executed if not prohibited by state law. One comment objected to a requirement that if a document is submitted for recordation by an attorney or agent, that the attorney or agent submitting the document must be separately licensed by the state bar in which the assignor and/or assignee lives, in addition to being licensed by the Office. Two comments inquired how the transfer of rights in the U.S. invention from a foreign inventor to a foreign company should be handled. One comment suggested the attorney or agent who is handling the substantive prosecution needs to be able to act fast to resolve ownership questions, for example to file a terminal disclaimer, or, for example, to ensure the correctness of the assignment recordation affirmations that the prosecuting attorney or agent makes when submitting the assignee's name on the issue fee transmittal sheet. Several comments cited impracticalities and difficulties if a patent agent is unable to prepare assignments, for example, where the application to be assigned has multiple inventors living in different states, hiring an attorney for each state simply to cause an assignment to be executed in such State would be an unnecessary administrative burden. One comment suggested that agents be allowed to select, not draft or vary, one or more form assignments by having the Office adopt standard form assignments, and that the Office establish well-defined, common, specific ''safe harbor'' situations in which agents can recommend such standard forms to their clients.

Response: The filing of an assignment, while not legally required for prosecution, is no doubt ''reasonably necessary and incident to'' prosecution of a patent application. This is true to enable an assignee of record of the entire interest to control prosecution of the application to the exclusion of the assignor. See 37 CFR 1.33(b)(4) and 3.71.

The diverse comments regarding the authority of practitioners to preparing assignments and licenses for patent applicants and patentees demonstrate the necessity for the Office to provide for appropriate circumstances when registered practitioners, including patent agents, may do so. Inasmuch as numerous situations involving assignments arise, the Office is not attempting by rule to explicitly identify all circumstances when a registered practitioner may prepare or cause an assignment to be signed. Instead, the provisions of § 11.5(b)(1) are written to broadly outline the circumstances when a practitioner may prepare an assignment for patent applicants and patentees by virtue of the practitioner's registration.

There is no statute or rule requiring training in contract law as a condition to be registered as a patent agent. No comment suggested any means whereby patent agents could receive adequate training and the competence to provide legal advice could be confirmed. Absent adequate training, a person drafting an assignment could overlook issues for which lawyers have received training. For example, in addition to preparing an assignment form, it may be necessary to advise whether the inventor is obligated to assign the invention, and if so, to whom. It may be necessary to resolve ownership questions, for example, to file a terminal disclaimer where there is no previously existing employment agreement or where an employment agreement contains no obligation to assign patent rights. In some situations, assignments lead to serious complexities, which can impact title and prevent patent enforcement. Patent agents are not empowered by their registration to provide advice about title and enforcement of patents. Accordingly, it is appropriate to set forth authority of practitioners to prepare an assignment or cause an assignment to be executed by virtue of their registration.

Preparing an assignment or causing an assignment to be executed is appropriate only when they are reasonably necessary and incidental to the preparation and prosecution of a patent application, or other proceeding before the Office involving a patent application or patent in which the practitioner is authorized to participate. The patent application may be, for example, a provisional, nonprovisional or reissue application. Other proceedings include, for example, an interference or reexamination proceeding. A practitioner, by virtue of being registered, may prepare an assignment or cause it to be signed in the foregoing circumstances if in drafting the assignment the practitioner does no more than replicate the terms of a previously existing oral or written obligation of assignment from one person or party to another person or party. Registration does not authorize a registered practitioner to recommend or determine the terms to be included in an assignment. The practitioner is not authorized to select or recommend a particular form assignment from among standard form assignments. Registration does not authorize a practitioner to draft an assignment or other document in circumstances that do not contemplate a proceeding before the Office involving a patent application or patent. For example, where an assignment is prepared in contemplation of selling a patent or in contemplation of litigation, there is no proceeding before the Office. When, after a patent issues, there is no proceeding before the Office in which the patent agent may represent the patent owner, drafting an assignment or causing the assignment to be signed are not activities reasonably necessary and incidental to representing a patent owner before the Office.

Section 11.5(b)(1) provides circumstances in which a registered practitioner may prepare an assignment or cause an assignment to be executed. The assignment must be reasonably necessary and incidental to filing and prosecuting a patent application for the patent owner or the practitioner represents the patent owner after the patent issues in a proceeding before the Office. In drafting the assignment the practitioner must not do more than replicate the terms of a previously existing oral or written obligation of assignment from one person or party to another person or party. Thus, where a previously existing written employment agreement between an inventor and the employing corporation contains one or more clauses obligating an inventor to assign to the company inventions made in the course of employment, a practitioner may draft an assignment wherein the provisions replicate those of the employment agreement.

Contrary to several comments, the Office has not taken the position that a registered patent agent could prepare a patent assignment or license for a patent if not prohibited by state law. The Office's long-standing position has been that ''[p]atent agents * * * cannot * * * perform various services which the local jurisdiction considers as practicing law. For example, a patent agent could not draw up a contract relating to a patent, such as an assignment or a license, if the state in which he/she resides considers drafting contracts as practicing law.'' See *General Information Concerning Patents, http://www.uspto.gov/web/offices/pac/doc/general/index.html.* Drawing up an assignment for an issued patent is not necessarily always reasonably necessary and incidental to filing or prosecuting a patent application or other proceeding before the Office involving a patent. For example, where a first party is selling and a second party is purchasing a patent, the transfer of patent rights between the parties is not a proceeding before the Office. Drafting an assignment for either party would be beyond the scope of recognition practice before the Office.

A license is neither reasonably necessary nor incidental to filing or prosecuting a patent application or a proceeding before the Office involving a patent. Under Office rules only an assignee of the entire interest, not a licensee, may revoke previous powers in a patent application and be represented by a registered practitioner of the assignee's own selection. See 37 CFR 1.36. Similarly, the rules do not authorize a licensee to control the representation of a party in a reexamination or interference proceeding. Accordingly, the Office has not authorized patent agents to draft license agreements in contemplation of filing or prosecuting patent applications or conduct proceedings before the Office regarding issued patents.

The suggestion to follow the practice of most states permitting paraprofessionals, such as patent agents, to complete and modify assignment and license documents under an attorney's supervision need not be adopted. Although 35 U.S.C. 152, 202, 204 and 261 refer to assignment or licensure of patents or patent rights, assignments and licenses are forms of contracts, which are creatures of state, not Federal law. Contracts are enforceable under state law. The authority to prepare contracts and provide advice regarding the terms to include in contracts is subject to the state law regarding who is authorized to practice law. It is unnecessary for the Office to authorize practitioners to comply with state laws permitting paraprofessionals to act under the supervision of an attorney where the State's authority to control the acts are not preempted by Federal law. It is not apparent from any comment that corporations or other organizations using few agreements in certain clearly defined situations have been or would be adversely impacted by the lack of an Office rule permitting patent agents to complete and modify documents assignment and license documents under an attorney's supervision.

No state was identified as prohibiting paraprofessionals from modifying assignments and license documents under a lawyer's supervision. Modifying assignment and license documents could necessitate expert knowledge of state principles for which registered practitioner status does not prepare agents. Whereas a corporation or other organization may employ paraprofessionals, including patent agents, to act under a lawyer's supervision, the attorney would remain responsible for the completed or modified document. There remains, however, registered patent agents who are self-employed and do not act under a lawyer's supervision. Adopting a rule requiring registered patent agents to act under the supervision of lawyers to modify assignment and license documents does not address in a satisfactory manner when patent agents may prepare the documents in reliance on their registration to practice before Office. Thus, the circumstances contemplated in the suggestion do not obtain for all patent agents practicing before the Office. Inasmuch as assignments and licenses are the creation of state, not Federal, statute, authority to prepare these agreements and provide advice regarding the terms to include in them is subject to the state law regarding who is authorized to practice law.

In a corporate or other organizational environment, where only one or two form agreements may be used in certain clearly defined situations, the provisions of § 11.5(b)(1) allowing a practitioner to replicate the terms of the form agreements support efficiencies sought by all interested parties. Section 11.5(b)(1) is not limited to practitioners employed by a corporation or practitioners acting under the supervision of a lawyer. The practitioners may be self-employed or in firms. Section 11.5(b)(1) permits any registered practitioner to replicate the terms of the form agreements for an assignment in contemplation of filing or prosecuting a patent application, and submit the same to the Office for recordation in connection with a concurrently filed or pending patent application. For example, where an inventor and investor, each possibly represented by their own counsel, have reached terms for assignment of an invention in contemplation of filing a patent application, a patent agent may draft the assignment if the agent does no more than replicate the terms of the previously existing oral or written assignment agreement between the inventor and investor. It is not necessary for the registered practitioner to be under the supervision of a lawyer to provide the service inasmuch as the agent is functioning as a scrivener.

It is not and has not been the intent of the Office to require the agent or attorney physically submitting a document for recordation to be separately licensed by the state bar in which the assignor and/or assignee lives. Additionally, there is no requirement that the attorney submitting a document for recordation in the Office be registered to practice before the Office. The recordation of documents is a ministerial act by the Office. The Office does not require the person or party submitting the document be registered to practice before the Office. For example, an assignment or license document may be submitted to the Office for recordation by a patent or trademark owner, a registered patent agent or a registered patent attorney who is separately licensed in a state other than the state wherein the attorney practices. However, whoever submits an assignment or license is responsible for ensuring the correctness of the

submitted documents. See 37 CFR 11.18. Likewise, the registered practitioner submitting the assignee's name on the issue fee transmittal sheet is responsible for ensuring the correctness of the contents of the sheet, including any representation that a party identified as an assignee is in the assignee. See § 11.18.

Comments regarding the transfer of rights in the United States of inventions from a foreign inventor to a foreign company implicitly address an invention that occurs abroad. Any transfer of rights would likely arise under foreign law, which would determine the appropriate person to draft any original assignment or license reflecting the transfer of rights. A patent agent may draft assignment that transfers rights in the United States that merely replicates the provisions of the previously existing oral or written obligation of assignment in a foreign country between the persons or parties. In the absence of a previously existing obligation of assignment in a foreign country, an attorney, presumably after consultation with the client, could draft the assignment for the client.

Suggestions that administrative burdens caused by not permitting patent agents to prepare assignments would justify permitting agents to draft assignments are unpersuasive. A typical situation cited is the administrative burden incurred when there is an application having multiple inventors living in different states if it is necessary to hire an attorney for each state simply to cause an assignment to be executed in such state instead of having an agent draft the assignment. The comments commonly assumed that all agents are competent to provide the legal services and the invention is to be assigned. First, there is no requirement that patent agents be trained in contract law to be registered to practice before the Office in patent cases. Absent adequate training, the client may not receive the legal advice and service the client has every right to expect. The possible temporary ''convenience'' of having a practitioner inadequately trained in the legal service the practitioner provides does not outweigh the need for competence. A practitioner is prohibited from handling a legal matter which the practitioner knows or should know that the practitioner is not competent to handle, without associating with another practitioner who is competent to handle it. See 37 CFR 10.77(b). Therefore, clients represented by a practitioner would be disserved by that practitioner if the practitioner is not competent to provide advice whether multiple inventors living in different states are subject to the contract laws of all the states or one state, whether the inventors are obligated to assign the invention, whether the inventors should assign as opposed to license the invention absent a legal obligation to assign, and other legal implications of any agreement. Burdens may arise for practitioners and clients when the clients are not competently advised about available legal options, such as licensure or assignment, as well as the benefits, terms and costs of each option. The convenience of having a registered practitioner provide a legal service for which no training is required for registration does not outweigh the benefits of obtaining competent legal advice and assistance.

The Office is not adopting the suggestion to allow agents to select, but not draft or vary, one or more form assignments by adopting standard form assignments, and that the Office establish well-defined, common situations, that would be specific ''safe harbor'' situations in which agents can recommend such standard forms to their clients. The very suggestion demonstrates the necessity for clients to receive competent legal advice before they sign any document transferring rights. There are numerous employment situations as well as other contractual and non-contractual situations requiring legal analysis and advice regarding whether and when an inventor is obligated to assign an invention, transfer shop rights in an invention, or license an invention. The situations are subject to state law, which varies from state to state. It would be inappropriate for the Office to adopt standard form assignments or adopt ''safe harbors'' inasmuch as no form or harbor could address or anticipate all possible terms and situations. Though the comment did not recommend that adoption of standard licensing forms and safe harbors for licensing, such action by the Office would be similarly imprudent. The fact that legal reference books provide numerous forms, rather than a single one, demonstrates that there is no standard for assignments or licenses, for which a ''safe harbor'' could be provided. Competent legal training is necessary to assess whether any rights in an invention should be transferred by assignment or license, as well as the terms for the transfer.

*Comment 11:* Two comments urged that the weight of authority holds that a patent agent may not advise about the content of alternate forms of state intellectual property protection. One comment urged that the USPTO lacks jurisdiction over state law forms of intellectual property protection, under state law, patent agents are not licensed to provide such advice. One comment made the same observation for a registered lawyer who is not licensed in the state where he or she is practicing.

Response: The Office is not expanding its jurisdiction over state law forms of intellectual property protection. Thus, § 11.5(b)(1) does not provide for a patent agent advising about the content of alternate state forms of intellectual property protection. Section 11.5(b)(1), consistent with Supreme Court precedent, provides for ''considering the advisability of relying upon alternative forms of protection which may be available under statute law.'' In *Sperry* v. *State of Florida ex rel Florida Bar,* 373 U.S. 379, 83 S.Ct. 1322 (1963), the Supreme Court said that the preparation and prosecution of patent applications for others constitutes the practice of law, which ''inevitably requires the practitioner to consider and advise his clients as to the patentability of their inventions under the statutory criteria, 35 U.S.C. 101—103, 161, 171, as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law.'' *Id.* 373 U.S. at 383, 83 S.Ct. at 1323. Patent agents should consider the advisability of relying on the alternative forms of protection available under statute law. Inasmuch as the state laws are public, agents should refer clients to the statutes and suggest that the client consult with an attorney of the client's choice in the state whether the statute has been adopted about the alternative forms of protection available under statute law. The same would obtain for a registered patent attorney who is not licensed in the state where the attorney is practicing unless the state where the attorney is practicing has authorized the attorney to provide legal services. For example, if the attorney is ''corporate counsel'' or ''in-house counsel'' and is licensed to practice law in another state, the attorney may provide legal advice about the state's statutes to the attorney's corporate employer if the state where the attorney is practicing has authorized the attorney to provide legal services for the attorney's employer in the state where the attorney is practicing.

*Comment 12:* One comment expressed doubt that listing explicit circumstances in which a patent agent may or may not participate is either necessary or helpful. Another comment urged that the ''includes, but is not limited to'' language in § 11.5 is vague and indefinite since it does not put the public on notice as to what else would constitute patent practice before the Office, that the Office needs to define

exactly what constitutes the practice of patent law subject to USPTO jurisdiction, and that the rule be amended to define practice before the Office as prosecution of patent applications before the Office, preparing assignments and licenses for patent applicants and patentees and rendering opinions on validity and infringement for clients.

Response: The Office will not attempt by rule to define exactly what constitutes practice of patent law that is subject to the Office's jurisdiction. The scope of activities involved in practice of patent law before the Office is not necessarily finite, and is subject to change as the patent statute changes and rules are promulgated to the implement statutory changes. Instead, § 11.5(b)(1) is written to provide that registration to practice before the Office in patent cases sanctions the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications or other proceedings before the Office involving a patent application or patent in which the practitioner is authorized to participate. The services are identified as including considering the advisability of relying upon alternative forms of protection which may be available under statute law, and drafting an assignment or causing an assignment to be executed for the patent owner in contemplation of filing or prosecution of a patent application for the patent owner, or the practitioner represents the patent owner after a patent issues in a proceeding before the Office, and in drafting the assignment the practitioner does no more than replicate the terms of a previously existing oral or written obligation of assignment from one person or party to another person or party.

The suggestion to define practice before the Office as prosecution of patent applications before the Office has not been adopted. Inasmuch as practice before the Office in patent cases also includes, for example, representing a patent owner seeking reexamination of an application or before the Board of Appeals and Interferences, limiting practice before the Office to only prosecuting patent applications would be inappropriately narrow.

The suggestion to define practice before the Office as rendering opinions on validity and infringement for clients has not been adopted. Whether a validity opinion involves practice before the Office depends on the circumstances in which the opinion is sought and furnished. For example, an opinion of the validity of another party's patent when the client is contemplating litigation and not seeking reexamination of the other party's patent could not be reasonably necessary and incident to the preparation and prosecution of patent applications or other proceedings before the Office involving a patent application or patent. In such situations, the opinion may constitute unauthorized practice of law. See *Mahoning Cty. Bar Assn.* v. *Harpman,* 608 N.E.2d 872 (Ohio Bd.Unauth.Prac. 1993). Similarly, a validity opinion for the sale or purchase of the patent is neither the preparation nor the prosecution of a patent application. Likewise, the opinion is not a proceeding before the Office involving a patent application or patent. Registration to practice before the Office in patent cases does not authorize a person to provide a validity opinion that is not reasonably necessary and incident to representing parties before the Office. In contrast, a validity opinion issued in contemplation of filing a request for reexamination would be in contemplation of a proceeding before the Office involving a patent. Due to registration to practice before the Office in patent cases, a practitioner may issue a validity opinion in contemplation of filing a request for reexamination.

In no circumstance would practice before the Office include the rendering of opinions on infringement. Under the law, the Office has no authority to resolve infringement cases. Thus, registration to practice before the Office in patent cases does not include authority to render infringement opinions. See *Mahoning Cty. Bar Assn.* v. *Harpman, supra.*

*Comment 13:* One comment suggested that the Office not adopt the last sentence of § 11.14(a), ''[r]egistration as a patent attorney does not itself entitle an individual to practice before the Office in trademark matters,'' inasmuch as any attorney meeting the qualification of being a member in good standing of a State or Federal Bar can practice before the Office in trademark cases. Another comment queried why registration as a patent attorney does not itself entitle an individual to practice before the Office in trademark matters.

Response: To clarify the intent of the last sentence of § 11.14(a), the term ''attorney'' has been changed to ''practitioner.'' The sentence now reads ''[r]egistration as a patent practitioner does not itself entitle an individual to practice before the Office in trademark matters.'' Whether a practitioner registered on or after January 1, 1956, has been registered as a patent attorney or patent agent, the practitioner's registration as an attorney or agent does not in itself entitle the practitioner to practice before the Office in trademark matters. To qualify to practice before the Office in trademark matters since January 1, 1956, a person must be an attorney meeting the statutory qualification of 5 U.S.C. 500 of being a member in good standing of the bar of the highest court of a State. However, the Office's recognition of a lawyer to practice before the Office in trademark matters does not authorize the attorney to engage in the practice of law where the attorney is not authorized to practice law. See § 11.14(d), and its predecessor rules, 10.14(d) and 2.14(d). Inasmuch as membership in a bar of a Federal court is not a qualifying criteria set forth in 5 U.S.C. 500 to practice before a Federal agency, it does not qualify a person to practice before the Office in trademark cases. A person lacking membership in good standing in the bar of the highest court of a state may not practice before the Office in trademark matters, even if the person is registered with the Office as a patent attorney. For example, a registered patent attorney who is suspended or disbarred on ethical grounds from practice of law or suspended on nonethical grounds, such as non-payment of annual dues, in State A, the only jurisdiction where the attorney was admitted to practice law, may not continue to practice before the Office in trademark matters following the effective date of the suspension or disbarment.

Further, a nonlawyer registered as a patent agent after January 1, 1956, is not qualified to practice before the Office in trademark matters. A person who was registered as a patent agent after January 1, 1956, and thereafter became an attorney who has remained in good standing with the bar of the highest court of a state may practice before the Office in trademark cases, even if the person never changed his or her registration status with the Office.

Furthermore, a person registered as a patent agent before January 1, 1956, who changed his or her registration status at any time to registered patent attorney cannot revert after 1956 to being a patent agent registered before January 1, 1956. If such a person does not maintain his or her membership in good standing with the bar of the highest court of a state, the person becomes an agent at that time and is not entitled to continue to represent others before the Office in trademark matters. Although the Office does not believe any person who was registered as a patent agent before January 1, 1956, has continuously remained registered as an agent and continues at this time to be so registered, the note at the end of § 11.14(a), which grandfathers their

authorization to practice before the Office in trademark cases, has been maintained for the benefit of any such practitioners.

*Comment 14:* A comment urged that § 11.14(a) is inconsistent with 5 U.S.C. 500(b), inasmuch as § 11.14(a) does not require attorneys to apply for recognition to practice, whereas section 500(b) can be construed as requiring an attorney to file with the Office a written declaration setting forth the attorney's current qualification.

Response: Inasmuch as nothing in 5 U.S.C. 500(b) directs any agency to require a written declaration setting forth an attorney's current qualification, the lack of such a requirement in § 11.14(a) is consistent with section 500(b). Except in the electronic filing of documents in trademark matters, the Office does not require an attorney to declare that he or she is currently qualified. If any change to the practice should occur, the change would be set forth in Part 2 of the Rules of Practice.

*Comment 15:* One comment sought clarification whether § 11.18(b)(1) refers to ''all disciplinary proceedings or only to those under section 11.32.''

Response: The provisions of § 11.18(b)(1) are inclusive of all disciplinary proceedings, including those instituted under § 11.32. This is made clear by § 11.18(a), which provides in pertinent part, that it is for ''all documents filed in the Office in * * * other non-patent matters, and all documents filed with a hearing officer in a disciplinary proceeding.'' For example, documents filed in the Office in ''other non-patent matters'' includes documents filed in disciplinary actions under §§ 11.24 through 11.26, and appeals under 11.55 in a disciplinary proceeding.

*Comment 16:* One comment recommended that § 11.18(b)(1) be amended to exclude complainants from its purview, as complainants should have immunity in disciplinary matters. The comment pointed out that Rule 12 of the Model Rules of Lawyer Disciplinary Enforcement of the American Bar Association provides for absolute immunity for members of the agency, complainants and witnesses although in a context of coordination with local law enforcement.

Response: The recommendation to provide complainants with immunity has not been adopted. While the rationale for providing complainants with immunity is appreciated, all persons filing written communications with the Office, including complainants, are subject to the provisions of 18 U.S.C. 1001, which provides, in pertinent part:

> [W]hoever, in any matter within the jurisdiction of the executive * * * branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years.

The Office is without statutory authority to waive the foregoing statutory provisions, even for complainants submitting a grievance. Legislation granting immunity to complainants would first have to be enacted into law before any regulation could be adopted applying the law to complainants in the disciplinary process.

*Comment 17:* A comment suggested that the mandatory language in § 11.18(b), pertaining to ''disciplinary proceeding'' may conflict with § 11.22(b), which provides that the OED Director may request that a grievant verify via affidavit information indicating possible grounds for discipline.

Response: The mandatory language of § 11.18(b)(2) pertaining to a ''disciplinary proceeding'' is not seen as conflicting with § 11.22(b), which pertains to a grievance which may initiate an investigation. An investigation and a disciplinary proceeding are distinct processes. An investigation may be initiated when a grievance is received suggesting possible grounds for discipline. See § 11.22(a). A disciplinary proceeding is initiated generally after an investigation under § 11.22. See § 11.32. A disciplinary proceeding also may be initiated in accordance with § 11.24, pertaining to reciprocal discipline, and § 11.25(b), pertaining to interim suspension and discipline based on conviction of committing a serious crime.

*Comment 18:* One comment queried the meaning of the terms ''unnecessary delay'' or ''needless increase'' in § 11.18(b)(2)(i), and suggested that they be further defined. The comment suggested that if the terms are directed to prosecution laches, such laches is effectively diluted, if not eliminated, by the provisions in 35 U.S.C. 154 for a 20-year patent term. The comment also suggested that there could be good and sufficient reasons for a delay, such as poverty and that a practitioner's advice to a client to file an application to keep the case alive should not be regarded as unnecessary delay.

Response: The suggestion that the terms be further defined has not been adopted. The relevant language of § 11.18(b)(2)(i), ''not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or needless increase in the cost of'' is taken from Rule 11 of the Federal Rules of Civil Procedure. Rule 11, titled ''Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions,'' provides, in pertinent part, ''(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.'' The case law under Rule 11 construing the terms ''unnecessary delay'' or ''needless increase'' provides practitioners with sufficient guidance for construing the use of the same terms in § 11.18(b)(1)(i). Contrary to the suggestion, the provisions of § 11.18(b)(1)(i) cover an array of different situations occurring in both patent and trademark proceedings. For example, the provision applies to: Third party filing a paper requesting withdrawal of an applicant's previously published patent application from issue to consider prior art; to a third party filing papers in an applicant's patent application to assert that the third party owns the claimed invention and discharging the practitioner engaged by the applicant to prosecute the application; as well as to a third party filing a notice of express abandonment in an applicant's patent or trademark application. Applicants having legally sufficient reasons to properly file continuing applications may do so in compliance with § 11.18(b)(1)(i).

*Comment 19:* Two comments noted that § 11.19(a) referenced ''all practitioners administratively suspended under § 11.11(b);'' ''all practitioners inactivated under § 11.11(c);'' and ''[p]ractitioners who have resigned under § 11.11(e),'' but these sections were not included in the Supplemental Notice of Proposed Rule making.

Response: While sections 11.11(b), 11.11(c) and 11.11(e) were included in the Notice of Proposed Rule making published in 2004, these sections have not been adopted at this time. Accordingly, reference to these sections is deleted from § 11.19(a) at this time.

Instead of referring to practitioners inactivated under 11.11(c), § 11.19(a) refers to practitioners inactivated under § 10.11.

*Comment 20:* One comment suggested that § 11.19(b) appears to disclaim Federal pre-emption, that the comments make clear that the authority of State or other local Bar Associations is not diminished, and that § 11.19(b) is not necessarily inconsistent with that authority.

Response: Contrary to the comment, nothing in § 11.19(b) disclaims Federal preemption. As stated in § 11.1, ''Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its Federal objectives.'' The USPTO Director is entitled to and does regulate the conduct of patent practitioners before the Office. The USPTO Director's authority is not intended to and does preempt the authority of states to discipline attorneys.'' *Kroll* v. *Finnerty,* 242 F.3d 1359 (C.A.Fed. 2001).

*Comment 21:* One comment agreed with the conviction of crimes as a basis for discipline, but suggested that ''serious crime'' in § 11.19(b)(1) be further clarified in order to give the notice as to what constitutes the scope of a ''serious crime.''

Response: The suggestion that ''serious crime'' be further clarified has not been adopted. The definition of ''serious crime'' is believed to provide the public with adequate notice of those crimes that constitute a serious crime in the jurisdiction where the crime occurs. The first part of the definition of ''serious crime,'' ''any criminal offense classified as a felony under the laws of the United States, any state or any foreign country where the crime occurred,'' informs the public that they must look to the definition of felony in the jurisdiction where the crime occurred. The second part of the definition, ''any crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the crime occurred, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a 'serious crime' '' identifies for the public that non-felony crimes involving one of eleven elements would constitute a ''serious crime.'' The definition is derived from the definitions of ''serious crime'' included in Rule 19(C) of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement and Rule I(B) of the American Bar Association Model Federal Rules of Disciplinary Enforcement. It is appreciated that criminal conduct may be a misdemeanor in one jurisdiction and a felony in another. Nevertheless, practitioners should conduct themselves in all jurisdictions to comport with the laws of the jurisdiction in which they are located.

*Comment 22:* Several comments observed that the references to the ''imperative USPTO Rules of Professional Conduct,'' ''§§ 11.100 *et seq.*'' or similar language in sections 11.19(b)(4), 11.19(c), 11.22(f)(2) and 11.25 have no meaning since the Office has not adopted the rules it proposed in December 2003, and suggested that the expression be changed to ''USPTO Rules of Professional Conduct as set forth in §§ 10.20 to 10.112 of Part 10 of this Subchapter'' until the new disciplinary rules are adopted.

Response: The suggestion to replace the reference to ''imperative USPTO Rules of Professional Conduct'' until the rules are adopted has been adopted, inasmuch as the disciplinary procedural rules are being adopted before the adoption of USPTO Rules of Professional Conduct. The current USPTO Code of Professional Responsibility in §§ 10.20 through 10.112 remains in effect until USPTO Rules of Professional Conduct are adopted. As is made clear in 37 CFR 10.20, not all of the rules of the USPTO Code of Professional Responsibility set forth in §§ 10.20 to 10.112 of Part 10 are mandatory. Some of the rules are aspirational. See 37 CFR 10.20(a). The Mandatory Disciplinary Rules of the Code of Professional Responsibility are identified in 37 CFR 10.20(b). The mandatory rules identified in § 10.20(b) are those that are referenced in sections 11.19(b)(4), 11.19(c), 11.22(f)(2), 11.25(a), 11.34(b), 11.58(b)(2) and 11.58(f)(1)(ii) until the Rules of Professional Conduct are adopted. In addition to replacing references to ''imperative USPTO Rules of Professional Conduct,'' references to § 11.100 et seq, §§ 11.100 through 11.806,'' and the like will be replaced. Sections 11.19(b)(4), 11.19(c), 11.22(f)(2), 11.25(a), 11.34(b), 11.58(b)(2) and 11.58(f)(1)(ii) are revised to refer to ''Mandatory Disciplinary Rules identified in § 10.20(b).'' Section 10.20(b) identifies the Mandatory Disciplinary Rules as §§ 10.22–10.24, 10.31–10.40, 10.47–10.57, 10.62–10.68, 10.77, 10.78, 10.84, 10.85, 10.87–10.89, 10.92, 10.93, 10.101–10.103, 10.111, and 10.112 of Part 10 of this Subchapter.

*Comment 23:* One comment inquired whether § 11.19(b)(3) meant that a disciplined practitioner who does not comply with proposed Rule 11.58(b) can again be disciplined upon seeking reinstatement because he or she did not comply with Rule 11.58(b), and whether the same obtained for a State Court that stipulates how the practitioner should wind up his or her business after a disciplinary action. The comment suggested that further clarification is necessary.

Response: The comment correctly recognized that a practitioner may be disciplined for failure to comply with an order issued by a court or a final decision issued by the USPTO Director disciplining the practitioner. For example, a suspended practitioner who continues to practice law in the jurisdiction where the practitioner has been suspended is subject to additional disciplinary action for practicing law with a suspended license.

*Comment 24:* One comment suggested that the language of § 11.20(a)(3) be changed to afford the public with notice that both private and public reprimand exist.

Response: The suggestion has been adopted by inserting ''private or public'' before ''reprimand''.

*Comment 25:* One comment said the Office should not limit restitution in § 11.20(b) to preclude an award of prejudgment interest, and suggested that the phrase '', along with any prejudgment interest'' be added after ''misappropriated client funds.'' Another comment pointed out that Rule 10(A)(6) of the Model Rules of Lawyer Disciplinary Enforcement (MRLDE) does not limit restitution.

Response: The suggestion has not been adopted. The restitution contemplated by § 11.20(b) is limited to the fees a client paid to a practitioner for the practitioner's legal services that were not earned, and client's funds that were delivered to and misappropriated by the practitioner. For example, where a client delivers funds to a practitioner to cover the practitioner's fee for filing a patent application as well as the Office's filing fee, and the practitioner neglects to file the application, the practitioner may be required to make restitution of funds for the filing fee and funds advanced for the practitioner's fee. The MRLDE presumes a disciplinary structural scheme operating under the aegis of the highest court in a state. The Office, unlike the MRLDE, is an agency in a department of an executive branch of the Federal Government. The Office operates within its statutory authority granted by Congress. It lacks statutory authority to

resolve legal disputes over fees or funds, or to award prejudgment interest. A client seeking prejudgment interest should consult with an attorney of the client's choice regarding available legal remedies, including enforcement of court-awarded judgments.

*Comment 26:* One comment suggested that § 11.21 be amended to require the OED Director to provide a hearing before a hearing officer prior to issuance of a warning. Two comments suggested that the recipient of the warning be permitted to demand a hearing as a form of appeal, particularly if any aspect of this is public or is deemed to adversely reflect upon the practitioner's fitness as a lawyer. To address the foregoing, the comments suggested additional language be added to § 11.23(b)(1) to provide a review process, or adoption of Rule 10(A)(5) of the Model Rules of Lawyer Disciplinary Enforcement (MRLDE) to require the practitioner's consent and the approval of the chair of a hearing committee.

Response: The suggestions have not been adopted as they are believed to be unnecessary. An avenue for review in a warning is already afforded by the rules. See § 11.2(e), which provides for filing a petition ''to the USPTO Director to invoke the supervisory authority of the USPTO Director in appropriate circumstances in disciplinary matters.'' Section 11.21 clearly provides that the warning is not public and is not a disciplinary action. Accordingly, no aspect of the warning adversely reflects upon the practitioner's fitness before the Office. Nevertheless, the review process afforded by § 11.2(e) provides adequate protection of a warned-practitioner's due process rights.

*Comment 27:* One comment suggested that a warning under § 11.21 appears to be inconsistent with § 11.2(b)(4), which provides that, unless the action to be taken as the result of an investigation is a summary dismissal of the matter, the OED Director must give a practitioner an opportunity to be heard or an opportunity to appeal from the warning.

Response: The comment misconstrues the provisions of § 11.2(b)(4). Section 11.2(b)(4) contemplates issuance of a summary dismissal without an investigation. A summary dismissal would be appropriate where, for example, a grievant seeks the intervention of the Office to collect a debt a practitioner allegedly owes the grievant. Section 11.21 contemplates that the ''OED Director may conclude an investigation with a warning.'' Accordingly, the OED Director may not summarily dismiss a grievance and issue a warning to the practitioner without an investigation. If a grievant supplements the grievance with sufficient facts to demonstrate that there are possible grounds for disciplinary action, an investigation would then ensue with the possibility of being concluded with a warning or other authorized disposition. If, following an investigation, the OED Director concludes that there is insufficient evidence to believe a disciplinary rule has been violated, but the investigated matter provides the practitioner with an opportunity to ensure conformity with the Office's disciplinary rules, the OED Director may issue a warning. The warning is neither public nor a sanction. The investigation provided the practitioner with an opportunity to be heard. A practitioner dissatisfied with the warning may petition to invoke the supervisory authority of the USPTO Director pursuant to § 11.2(e).

*Comment 28:* One comment suggested that § 11.22 provide for operations as set forth in Rule 4(B)(6) (provide grievant notice of the status of disciplinary proceedings at all stages of the proceedings, copies of the same notices and orders the respondent receives as well as copies of respondent's communications to the agency, except information that is subject to another client's privilege); Rule 4(B)(13) (refer appropriate cases to an Alternatives to Discipline Program pursuant to MRLDE Rule 11(G), to a central intake office, or to any of the component agencies of the comprehensive system of lawyer regulation established by MRLDE Rule 1); Rule 11(A) (evaluation of the information received); and Rule 11(B)(3) (provide for review of disciplinary counsel's recommended disposition other than a dismissal or a referral to the Alternatives to Discipline Program shall be reviewed by the chair of a hearing committee) of the ABA's Model Rules of Lawyer Disciplinary Enforcement (MRLDE).

Response: The suggestion to provide grievants by rule with the mechanisms and proceedings set forth in MRLDE Rules 1(B), 4(B)(6) and (13), 11(A) and 11(B)(3) has not been adopted. To the extent ''disciplinary proceeding'' in MRLDE Rule 1(B) contemplates investigations or other proceedings covered by the Privacy Act, 5 U.S.C. 552a, protected records may not be disclosed unless the subject of the record consents or one of twelve exceptions apply. The exceptions do not enable the Office to provide a grievant with status information about investigations or proceedings, or to routinely distribute copies of all communications the respondent receives from and sends to the OED. One of the twelve exceptions permits protected information to be released as a routine use to persons who can be expected to provide information needed in connection with a grievance. In accordance with the authorized routine use of information, OED may provide a grievant with a copy of the respondent's communication to obtain the grievant's input needed in connection with the grievance. Regarding the suggestion to adopt MRLDE Rule 4(B)(13), the Office has neither the resources nor means for creating an Alternatives to Discipline Program or ''component agencies'' for lawyer regulation. In appropriate circumstances, the Office may commend a receptive practitioner to the same or similar programs operated by state bars or other agencies in the state where the practitioner is located. Regarding the suggestion to adopt MRLDE Rule 11(A), the OED Director evaluates all information received regarding possible grounds for discipline. If the person is not subject to the jurisdiction of the Office, the matter is referred to the appropriate entity. If the information is true and would not constitute misconduct or incapacity, the matter is dismissed. If the practitioner is subject to the Office's jurisdiction and the information alleges facts which, if true, would constitute possible grounds for discipline, an investigation is conducted. At the conclusion of the investigation, the matter is evaluated and the OED Director may close the matter without taking further action, issue a warning under § 11.21, settle the matter under § 11.26, proceed with exclusion on consent in accordance with § 11.27, or pursue disciplinary action in accordance with § 11.32. Regarding the suggestion to adopt MRLDE Rule 11(B)(3), a recommendation by the OED Director to discipline or pursue a disciplinary proceeding against a practitioner is subject to review. For example, no disciplinary proceeding under § 11.34 can be instituted without the Committee on Discipline finding probable cause under § 11.32, and no settlement or exclusion on consent can occur without the concurrence of the USPTO Director in accordance with §§ 11.26 and 11.27, respectively. Further, practitioners dissatisfied with a warning issued by the OED Director under § 11.21 may use the provisions of § 11.2(e) to petition to invoke the supervisory authority of the USPTO Director in disciplinary matters.

*Comment 29:* One comment suggested that § 11.22(d) be amended to provide that the evidence the OED Director considers includes evidence indicating that a grievable offense did not occur.

Response: It is unnecessary to mention in § 11.22 that the OED

Director considers evidence tending to negate a finding that a violation occurred. The OED Director necessarily considers such evidence. Evidence tending to negate the occurrence of a violation is considered, for example, when an investigation is closed without a warning or taking disciplinary action as in § 11.22(i)(1). The OED Director, when terminating an investigation under §§ 11.22(i)(2), 11.22(i)(3) and 11.22(i)(4), also may consider such evidence.

*Comment 30:* One comment observed that § 11.22(f)(1) would allow the OED Director to request financial books and records, including the nonpublic and proprietary records of a corporation or law firm, as well as attorney-client privileged information, and recommended limiting document inspection to an examination of escrow accounts and trust accounts for compliance with proposed Rule 11.115(a).

Response: The suggestion to limit the rule to permitting inspection of only escrow and trust accounts has not been adopted. Records required to be kept by law are ''public records'' outside the scope of the Fifth Amendment protection. In *Shapiro* v. *United States,* 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), the court concluded that records and documents-sales invoices, sales books, ledgers, inventory records, contracts and sales records—required to be kept by valid regulations of the Office of Price Administration—could be subpoenaed by the Price Administrator without violating the individual's right against self-incrimination. The required records doctrine has been applied in numerous and various circumstances, including records an attorney is required to maintain pertaining to client funds. See, for example, *Andresen* v. *Bar Association of Montgomery County,* 305 A.2d 845 (Md. 1973), *cert denied,* 414 U.S. 1065, 94 S.Ct. 572, 38 L.Ed.2d 470 (1973). Under § 10.112(c)(3), a practitioner is required to ''maintain complete records of all funds, securities and other properties of a client coming into the possession of the practitioner.'' Regardless of the repository of client property, these are the financial records anticipated for review if issues arise as to the preservation and proper handling of client property.

*Comment 31:* One comment suggested that § 11.22(f) be amended to provide safeguards to ensure that information in disciplinary investigations will be kept secure and confidential, free from requests from other government agencies or from the public under the Freedom of Information Act.

Response: The suggestion to amend § 11.22(f) to provide safeguards to ensure the security and confidentiality of the received information has not been adopted as it is believed to be unnecessary. Section 11.22 need not provide safeguards because information collected in an investigation is placed into a Privacy Act system of records, in this case COMMERCE/PAT-TM–2, Complaints, Investigations and Disciplinary Proceedings Relating to Registered Patent Attorneys and Agents, published at 70 FR 69522. Further the Privacy Act of 1974, 5 U.S.C. 552a, provides numerous protections for those records. Regarding the requests for release of these records under the Freedom of Information Act (FOIA), Privacy Act records may not be disclosed unless one of the subject parties of the record consents or one of twelve exceptions apply. One of the twelve exceptions provides for information that is releasable under FOIA. This is a statutory exception that cannot be altered by rule making. Generally, the information is protected from disclosure by FOIA exemptions 5 and 6. See 5 U.S.C. 552(b)(5) and (6), respectively. Thus, the collected information is subject to the numerous protections of the Privacy Act, and will not be released to FOIA requests as provided for under current Federal law.

*Comment 32:* One comment, pertaining to § 11.23, objected to the Committee on Discipline drawing any adverse inference when finding probable cause against a practitioner if the inference is based solely upon that practitioner's refusal to produce information in response to a request for information by the OED Director. The comment addressed a statement in the ''Discussion of Specific Rules'' in the SNPR about the ability of the Committee to ''draw an adverse inference from the practitioner's refusal to provide information or records in determining whether probable cause exists to believe a disciplinary rule has been violated.'' 72 FR 9200.

Response: While we appreciate an objection to a finding of probable cause if it is based solely on a practitioner's refusal to produce information, the ''Discussion of Specific Rules'' did not state that such a finding is justified where it is based ''solely'' on refusal to produce information in response to a request for information. During an investigation, a practitioner is given the opportunity to provide answers to a reasonable inquiry, and where appropriate, produce records that are not protected by the attorney-client privilege or other protections. When the practitioner refuses to answer or provide unprivileged information, the OED Director still has the burden of providing the members of the Committee panel with sufficient evidence to determine that there is probable cause to bring charges that practitioner engaged in conduct involving grounds for discipline. See § 11.23(b)(1). When the OED Director provides such sufficient, uncontested evidence, the Committee panel may properly find probable cause relying on the evidence presented by the OED Director, inferences drawn from that evidence, as well as adverse inferences drawn from the practitioner's refusal to answer the inquiry or produce unprivileged information. A practitioner's reliance on the Fifth Amendment to not answer or provide information may not preclude such inferences. *Baxter* v. *Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976) (''[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.''); *AGC, Maryland* v. *DiCicco,* 802 A.2d 1014 (Md. 2002); In *re Henley,* 518 S.E.2d 418 (Ga. 1999).

*Comment 33:* Two comments expressed concern with regard to § 11.22(f)(2) that a client may waive the attorney-client privilege, as well as related protections by disclosing information to the OED Director. One comment suggested adding the following sentence to § 11.22(f)(2): ''The OED Director shall not request information or evidence from a non-grieving client absent either written consent of the practitioner or a signed acknowledgement from the non-grieving client acknowledging that complying with the request could jeopardize the privileged or confidential nature of information disclosed to the OED Director as well as other information on the same subject.'' Both comments suggested that in any request of a non-grieving client to provide information to the Office, the request be accompanied by a notice clearly warning that disclosure to the Office could waive any attorney-client privilege or other protection.

Response: The suggestion in the comment to add a sentence to § 11.22(f)(2) requiring a signed acknowledgement of the non-grieving client has not been adopted. Requiring the OED Director to obtain the written consent of the client before requesting information would not only make investigations inefficient, but also unduly complicate an investigation. By having to first obtain the non-grieving client's written consent, the process of

requesting and obtaining the consent would be time-consuming. It also provides a practitioner with an opportunity to communicate and dissuade the client from cooperating with the investigation, and otherwise obstruct the investigation. Requesting information and documents from practitioners, as well as from non-grieving clients is intended to enable the OED Director, and ultimately the Office, to efficiently and effectively ascertain whether grounds for disciplining a practitioner exist. The OED Director, when requesting information from complaining clients of lawyers or registered patent agents, has frequently informed the clients that providing the requested information may waive attorney-client privilege or other protection. The Office will expand the practice to any occasion when the OED Director requests a non-grieving client to provide information by accompanying the request with a notice clearly warning that disclosure to the Office could waive any attorney-client privilege or other protection.

*Comment 34*: A comment suggested, presumably with regard to § 11.22, that provision be made for an appeals mechanism, such as Rule 31 of the Model Rules of Lawyer Disciplinary Enforcement, whereby a grievant who is dissatisfied with the disposition of a matter by the OED Director may seek review, within a specified period, by an authority which may approve, modify or disapprove the dismissal, or direct that the matter be investigated by the OED Director.

Response: It is unnecessary to provide an appeal mechanism limited to enabling a grievant, dissatisfied with the disposition of a matter, to obtain review of the matter. The provisions of § 11.2(e) for a petition to invoke the supervisory authority of the USPTO Director in disciplinary matters provide the suggested mechanism without addition of another rule. Grievants will be informed of the mechanism under § 11.2(e) whereby they may obtain review of the disposition of the matter they grieve.

*Comment 35*: One comment suggested that the Office should avoid devotion of time and effort to investigating regarding ''importune grievances'' by amending § 11.22(h)(2) to add '', such as matters arising in proceedings in Federal or state courts of original or appellate jurisdiction or other tribunals not within the Office.''

Response: The suggestion to add language to § 11.22(h)(2) to provide that ''matters arising in proceedings in Federal or state courts of original or appellate jurisdiction or other tribunals [are] not within the Office'' has not been adopted. Neither the grounds for discipline, nor the jurisdiction of the Office to discipline practitioners is limited to conduct occurring ''within the Office.'' The grounds for discipline include conduct that may involve proceedings in Federal or state courts or other tribunals, such as conviction of a serious crime, discipline on ethical grounds imposed in another jurisdiction, disciplinary disqualification from participating in or appearing before any Federal program or agency, and failure to comply with any order of a court disciplining the practitioner.

*Comment 36*: One comment opined that § 11.22(h)(4) can be read to unduly limit the circumstances under which the OED Director can close an investigation, and suggested that it be broadened by revising the section to read as follows: ''There is insufficient clear and convincing evidence for a reasonable fact finder to conclude that there is probable cause to believe that grounds exist for discipline.''

Response: The suggestion to add language to § 11.22(h)(4) to provide that there must be ''insufficient clear and convincing evidence'' has not been adopted. The suggested language actually limits the circumstances under which the OED Director, with the concurrence of the Committee on Discipline, may bring a disciplinary action by raising the level of proof from ''probable cause'' to ''clear and convincing.'' The burden of proof before a grand jury to initiate a criminal proceeding is ''probable cause,'' not ''clear and convincing evidence.'' Moreover, there is nothing in the language of § 11.22(h)(4) that should be understood or construed as permitting the ''clear and convincing evidence'' standard to be read into this section.

*Comment 37*: One comment recommended that the panels of the Committee on Discipline referenced in § 11.23(a) not exceed three members, and, citing the McKay Report,[1] that each panel have a majority of non-Office employee members, and that no panel should function without one attorney practitioner member and one registered patent agent member. Another comment suggested that one member of the Committee be required to be a member of the public with experience representing clients before the Office.

Response: The recommendation that the Committee on Discipline panels not exceed three members is consistent with the rule as proposed, and no change to the last sentence of § 11.23(a) appears necessary.

The suggestions to require one or more non-Office employees or a member of the public to be on the Committee on Discipline have not been adopted as they are highly impractical for several reasons. First, adjudication of disciplinary proceedings is considered to be an inherently governmental function and the Federal Government may not contract for inherently governmental functions. See generally Federal Acquisition Regulation Part 7.5, and specifically § 7.503(c)(2). Further, there must be a mechanism to compensate those serving on the panel. It is impermissible to contract to pay the non-government employee panel members. In addition, even if it were permissible to add panel members by contract, such an arrangement would necessitate approval of a charter for the arrangement under the Federal Advisory Committee Act. The Federal Advisory Committee Act prohibits a collaborative group that is established or utilized by the government to provide advice or recommendations to an agency unless a charter is approved by the General Services Administration. See 5 U.S.C. App 2 section 1 *et seq.* Even if a charter is approved, the non-government employee panel members may provide only advice or recommendations; they may not adjudicate whether there is probable cause to bring disciplinary action against a practitioner.

An alternative approach to paying the members would be to make the private practitioners Special Government Employees (SGEs) during their period of service. See 18 U.S.C. 202. As SGEs, the practitioners would be Government employees during their period of service, and the Federal Advisory Committee Act would no longer apply. The Committee panels would then be groups comprised solely of Government employees, which are not subject to the Federal Advisory Committee Act. See 41 CFR 102–3.40(h). Appointment of private practitioners as SGEs would require a Federal statute creating such authority. For example, Patent Public Advisory Committee members may be appointed as SGEs under the authority of 35 U.S.C. 5. Currently the Office has no such statutory authority. Again, the non-government employee panel

[1] In 1968, the American Bar Association (ABA) established the Clark Committee (chaired by former U.S. Supreme Court Justice Tom Clark). The Clark Committee issued its Report, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Clark Report), 1 (1970). In 1989, the ABA established the McKay Commission (chaired by former N.Y.U. Law School Dean Robert B. McKay) to examine the effects of the Clark Report and to study additional reforms. The McKay Commission's Report, LAWYER REGULATION FOR A NEW CENTURY (1992) is referred to as the McKay Report.

members may provide only advice or recommendations; they may not adjudicate whether there is probable cause to bring disciplinary action against a practitioner.

However, this solution has a significant drawback. Private practitioners would be subject to many of the ethical rules of Government employees during their periods of service. See generally Summary of Government Ethics Rules for SGEs, Justice Management Division, February 6, 2006. Practitioners serving for greater than 60 days in the proceedings 365 days would be prohibited from receiving fees for representing anyone with a matter pending before the Government, and from acting as an attorney or agent for a party pursuing a claim, such as a patent application, before the Government. See 18 U.S.C. 203 and 205, respectively. While SGEs may serve up to 130 days in any 365-day period, the restrictions of 18 U.S.C. 203 and 205 are triggered at the 60-day point. Practitioners would be effectively barred from patent and trademark work by this provision. Additionally, the arrangement is not beneficial to the Office. If members of the panel could only serve 60 days or less in a year, the Office would have to find and appoint members frequently, and panel members would not develop the expertise that comes with lengthier service.

Second, including panel members from private practice would be extremely difficult due to screening for conflicts of interest. For example, if practitioner Smith is subject to review by a Committee panel, it is necessary to screen for conflicts between Smith and the panel members, and disclosure of the practitioner's identity of the panel members from private practice to ascertain such conflicts could violate the Privacy Act, as discussed below. Further, it would be necessary to ensure that panel members from private practice are impartial, for example, that they do not represent clients with interests adverse to Smith's clients. The Office does not know, and cannot compel Smith to disclose, the names of all of Smith's clients to facilitate a conflicts check of panel members from private practice. Even if Smith's clients were known, this could result in review of lists involving hundreds of clients. Using Office employees as panel members avoids this significant workload.

Third, while the McKay Report does urge that disciplinary officials be independent, the report does not specifically urge that those who administer discipline be non-government employees. Rather, the recommendation for independence of disciplinary officials rests in distinguishing judicial regulation from self-regulation, not distinguishing employees from non-employees. See the McKay Report at recommendations 1, 5, and 6. The two primary reasons cited by the McKay Report are one, that the disciplinary process should be directed solely by disciplinary policy and not influenced by the politics of bar associations, and two, that the process be free from even the appearance of conflicts of interest or impropriety. See the McKay Report, introduction to recommendations 5 and 6. Neither of these factors suggests non-government employees have greater independence than employees. Further, the McKay Report is focused on judicial regulation of disciplinary systems to avoid self-regulation by state bars, whereas attorneys and agents practicing before a Federal administrative agency are regulated by that agency.

The McKay Report criticizes self-regulation of the legal profession. Including private practitioners as members of the Office's Committee on Discipline adds an element of self-regulation. The practitioners, who could only serve a limited number of days per year, would remain a part of private practice, and would have less independence than the full-time employees of the Office.

In addition to the foregoing, release of information regarding an investigation to a member of the public on a panel would be inconsistent with the Privacy Act, 5 U.S.C. 552a. There are twelve exceptions under the Freedom of Information Act whereby information may be released with authorization. To the extent the suggestion contemplates attorneys and patent agents employed by other Government agencies, implementation would be operationally impractical. In view of the comments, the Office also considered and rejected having one or more members of the public serving in an advisory role to the panels as the panels consider whether there is probable cause. The Office appreciates the benefits that could accrue from including members of the public on the panels, including an increased credibility of the disciplinary process in the eyes of the public. There are a number of reasons the suggestions are not feasible. As already noted, non-employees may not make inherently governmental decisions, such as finding probable cause to bring disciplinary proceedings thereby authorizing the proceedings to be initiated. Disclosure of the grievances, investigation files and deliberations to members of the public is not authorized as a routine use of the system of records under which these documents are maintained, and is inconsistent with the Privacy Act. Further, no practical or feasible means is apparent or suggested for adequately screening the public for conflicts of interest with the practitioner and the practitioner's clients before disclosing records or information to the member of the public. The Office does not know all the clients of a practitioner and the members of the public, or even prior relationships between the practitioner and member of the public. Therefore, the Office could not ascertain the existence of potential or actual conflicts without obtaining the information voluntarily from each party, which is unlikely to occur. Therefore requiring a member of the public to be on each panel is neither legally nor realistically possible. The Office is considering establishing an advisory committee for the OED Director to provide advice regarding enrollment and disciplinary matters and will seek public input into the formation and role of such a committee.

*Comment 38:* One comment suggested that language be inserted in § 11.23 to provide that a complaint should not be approved unless sufficient probable cause exists for a fact finder to conclude ''by clear and convincing evidence'' that a violation has occurred.

Response: The suggestion to add ''by clear and convincing evidence'' to § 11.23 has not been adopted. The Office has used, and continues to use, a probable cause standard to initiate a disciplinary action. The ''probable cause'' standard differs from, and is not inclusive of, the ''clear and convincing evidence'' standard. A complaint is approved only after the Committee on Discipline, independent of the OED Director, reviews the record and information provided by the OED Director. A disciplinary proceeding is instituted under § 11.34 when the OED Director files a complaint, and the OED Director thereafter has the burden of proving the case against a practitioner by clear and convincing evidence. Use of the probable cause standard, as opposed to a ''clear and convincing evidence'' standard to initiate a disciplinary proceeding is appropriate. The Office, like the states and the District of Columbia, complies with due process standards applicable to administrative enforcement proceedings. All or most of the procedures specified in the ABA's Model Rules for Lawyer Disciplinary Enforcement, which were devised in light of applicable due process and similar constraints, have been followed

by many states. Under those rules a screening body, independent of the disciplinary counsel, determines whether probable cause exists warranting formal charges. See Restatement (Third) of the Law Governing Lawyers Current through August 2007, Chapter 1, Regulation Of The Legal Profession, Topic 2, Process Of Professional Regulation, Title C, Professional Discipline Introductory Note. Probable cause is sufficient to institute civil proceedings. See *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 63, 113 S.Ct. 1920, 1929 (1993) (''Probable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f]' that there is a chance that [a] claim may be held valid upon adjudication'' quoting *Hubbard* v. *Beatty & Hyde, Inc.*, 178 N.E.2d 485, 488 (Mass. 1961)). A probable cause determination is not a constitutional prerequisite to a charging decision in a criminal matter. *Gerstein* v. *Pugh*, 420 U.S. 103, 123, 95 S.Ct. 854, 868 (1974). Therefore, probable cause is an appropriate standard for the Office to use to initiate disciplinary proceedings.

*Comment 39:* One comment suggested with regard to § 11.23(b) that the OED Director be required to present to the Committee on Discipline evidence that tends to negate the conclusion that a disciplinary violation occurred by inserting the phrase ''including evidence that tends to negate the conclusion that a violation has occurred.''

Response: The suggestion to insert the phrase ''including evidence that tends to negate the conclusion that a violation has occurred'' into § 11.23(b)(1) has not been adopted. The Office agrees and follows the practice suggested by the comment. That is, the investigation file is available to the Committee as it considers all the available evidence. It long has been the OED Director's practice to make available to the Committee the entire investigation file, including every statement and document the practitioner has presented to explain his or her conduct. Thus, the Committee has the opportunity to consider evidence negating the conclusion that a disciplinary violation occurred and the insertion of the phrase is unnecessary.

*Comment 40:* One comment recommended that the provisions of § 11.24 be expanded to permit reciprocal disciplinary proceedings to also be initiated upon notice that a practitioner has been subject to public censure or public reprimand, probation, or placed on disability inactive status by a state or by a Federal court.

Response: The recommendation to expand reciprocal disciplinary procedures to circumstances when a practitioner has been subjected to public censure or public reprimand, probation, or placed on disability inactive status has been adopted in part. The phrase ''publicly censured, publicly reprimanded, subjected to probation,'' has been inserted in the first sentence of § 11.24(a) after ''being'' (first occurrence) and before ''disbarred.'' The same or similar language has been inserted into the third and fourth sentences of § 11.24(a), as well as in sections 11.24(b), 11.24(b)(1), 11.24(b)(3), 11.24(c), 11.24(d), 11.24(d)(1)(iii), 11.24(d)(1)(iv), 11.24(e), and 11.24(f) to enable the sections to be consistent in scope and application.

The recommendation to include practitioners placed on disability inactive status by a state or by a Federal court has not been adopted. Typically, states provide that where a lawyer has been judicially declared incompetent or committed to a mental hospital after a judicial hearing, or where a lawyer has been placed by court order under guardianship or conservatorship, or where a lawyer has been transferred to disability inactive status in another jurisdiction, the state's highest court, upon proper proof of the fact, is authorized to enter an order transferring the lawyer to disability inactive status. A copy of the order must be served, in the manner the court may direct, upon the lawyer, his or her guardian or conservator, and the director of the institution to which the lawyer is committed. In some jurisdictions, the court suspends the lawyer instead of transferring the lawyer to disability inactive status. While the nature of the proceeding is protective of the public, in no sense is the proceeding disciplinary in nature. Accordingly, it would be inappropriate to include a court's placement of a practitioner on disability inactive status in a reciprocal disciplinary rule.

The Office does share the concern implicit in the comment that a practitioner placed on disability inactive status may not be competent to represent others before the Office. Therefore, a practitioner who has been suspended or placed on disability inactive status in another jurisdiction should not continue to practice before the Office unless and until the practitioner is restored to active status in the jurisdiction where the practitioner first obtained disability inactive status.

*Comment 41:* Several comments suggested that the scope of crime required by the first sentence of § 11.25(a) to be reported is too broad. One comment queried whether particular conduct, such as jay walking and traffic offenses, would be included. One comment suggested that the administrative burden of requiring practitioners to report and the OED Director to process crimes as trivial as traffic violations dictates that a notification requirement encompassing a narrower scope of convictions should be adopted, and recommended adopting a notification rule requiring notification of ''serious crimes'' excluding ''misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs.''

Response: The recommendation to narrow the scope of crimes reportable upon conviction has not been adopted. The definition of crime in § 11.1 provides the public with notice of the criminal conduct that must be reported to the OED Director upon conviction. The burdens on practitioners and the OED Director are reasonable. The Office, unlike state courts that adopt disciplinary procedure rules, cannot direct court clerks, judges or prosecuting attorneys to report the criminal conviction of an attorney or registered patent agent to the Office. A number of jurisdictions require attorneys to self-report that they have been found guilty of a crime or plead guilty to a criminal charge. For example, see Rule IX, Section 10(a) of the rules governing the District of Columbia Bar. The scope of reportable crimes in the first sentence of § 11.25(a) should be broad and expansive, as it is simply information that the OED Director should have available in the OED Director's continuing responsibility to oversee the good moral character of a practitioner and fitness in other respects necessary to continue to have the privilege to continue in the practice before the Office. If the crime is not a ''serious crime,'' the OED Director will process the matter in the same manner as any other information coming to the attention of OED.

*Comment 42:* One comment suggested, with regard to § 11.25, that a ''serious crime'' violating some Federal or State law includes all ''crimes'' because § 11.1 defines ''crime'' as including ''any offense declared to be a felony by Federal or State law'' and a violation of foreign law is only a ''serious crime'' and never a ''crime.'' The comment also suggested that if any felony is a ''serious crime,'' the reporting requirement may be too broad and administratively burdensome, and recommended limiting the reporting requirement to ''crimes involving moral turpitude,'' deleting the definition of

''serious crimes,'' and including violations of foreign laws as ''crimes.''

Response: The suggestions regarding ''serious crime'' have not been adopted. While a ''criminal offense classified as a felony under the laws of the United States, or any state * * * where the crime occurred'' is, by definition in § 11.1, a ''serious crime,'' all crimes are not serious crimes. For example, numerous criminal offenses under the laws of the United States and states are misdemeanors, not felonies. Only certain types of misdemeanors may qualify as a ''serious crime.'' By definition, a misdemeanor is a serious crime only if a necessary element of the crime ''includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a 'serious crime'.'' See § 11.1, ''Serious Crime.'' As not all misdemeanors involve any of the foregoing elements, not all misdemeanors can be a serious crime, and not every crime that violates some Federal or State law is a ''serious crime.'' Likewise, a violation of foreign law is not necessarily a ''serious crime.'' For example, to be a serious crime, the foreign law violated must be a criminal law that is classified as a felony in the foreign country. The second sentence of § 11.25(a) distinguishes between ''serious crimes,'' as the triggering event for Reciprocal Discipline, and ''crime,'' as it refers to the self-reporting aspect of the first sentence of § 11.25(a). The definition of ''serious crime'' is necessarily a higher standard than the definition of ''crime.'' The higher threshold for ''serious crime'' conduct is beyond that for which there is a continuing presumption of fitness. It follows that the reporting requirement is neither too broad nor administratively burdensome. Conviction of a ''serious crime'' overcomes and thereby triggers an immediate or expedited review of such conduct to protect the public, the profession and the Office from unfit and unacceptable practitioners by the imposition of discipline in an expedited fashion. Unlike ''moral turpitude,'' the definition of serious crime identifies, by an objective standard, crimes for which interim suspension is appropriate.

*Comment 43:* One comment took issue with § 11.25(c) providing a practitioner with forty days to challenge the appropriateness of the entry of interim suspension where the practitioner has been convicted of a serious crime. The comment pointed out that given the conclusiveness of the criminal conviction under § 11.25(c), a long response time is not warranted in these cases because delay in these proceedings risks harm to the public.

Response: The suggestion has been adopted to shorten the time a practitioner subject to interim suspension proceedings for conviction of a serious crime has to challenge the appropriateness of the entry of such a suspension. The Office concurs that a long response time is not warranted in these cases because delay in these proceedings risks harm to the public. Inasmuch as some registered practitioners are located abroad, adequate time must be provided to receive and reply to the notice. Accordingly, the reply period has been changed in § 11.25(b)(2)(iii) to thirty days, which is the same time provided for responding to a complaint in a disciplinary proceeding.

*Comment 44:* One comment noted a typographical error in the first sentence of § 11.26 when reference should have been made to § 11.34 instead of § 11.24.

Response: The suggestion to change the reference in the first sentence of § 11.26 from § 11.24 to § 11.34 has been adopted.

*Comment 45:* One comment recommended that § 11.34 require that the complaint list the specific PTO Rule(s) allegedly violated by adding the phrase ''including citation to every imperative USPTO Rules of Professional Conduct allegedly violated'' to the end of § 11.34(a)(2).

Response: The recommendation to require the complaint to list the specific Office Rules of Professional Conduct that are alleged to be violated has not been adopted, as it is unnecessary. Listing the rules allegedly violated is provided for in § 11.34(b), which requires the complaint ''fairly informs the respondent of any grounds for discipline, and where applicable, the Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10 of this Subsection that form the basis for the disciplinary proceeding.'' It is, and has long been, the practice to specifically list the Office rules allegedly violated by the practitioner's conduct.

*Comment 46:* Two comments urged the time provided in § 11.36(a) for answering a complaint should be measured from the date the complaint is served on the respondent, rather than the date it is filed to assure that respondents have an appropriate time within which to answer a complaint.

Response: The suggestion to revise the time for filing an answer to be measured from the date the complaint is served has not been adopted. The current procedure used in disciplinary proceedings, measuring the time for filing an answer from the date the complaint is filed, is the same procedure used for prosecution of patent and trademark matters. Practitioners are familiar with the procedure, and practitioners may and do obtain extensions of time to file an answer. No difficulties have arisen with its operation in disciplinary matters. The current procedure provides all parties with a date certain from which to measure when a response is due. Inasmuch as service of the complaint may be by mail, and not all complaint recipients sign for delivered mail, changing the period to be measured from the date of service would necessitate elimination of service by first class mail. It has not been apparent that any benefit currently unavailable would be obtained by the change.

*Comment 47:* Two comments urged, presumably with regard to § 11.39, that the USPTO Director adopt a policy of always appointing administrative law judges as hearing officers to maintain the requisite independence of the process.

Response: The Office appreciates and understands the need for the hearing officer to be independent. The Patent Statute provides that the USPTO ''Director shall have the discretion to designate any attorney who is an officer or employee of the United States Patent and Trademark Office to conduct the hearing required by this section.'' See 35 U.S.C. 32. Accordingly, the provisions of § 11.39(a) have been written to be consistent with the statute. The USPTO's current practice is to use administrative law judges from EPA as the hearing officer in disciplinary matters; however, the statute does not require administrative law judges from outside the agency be employed. Furthermore, a hearing officer cannot be subject to first level or second level supervision by either the USPTO Director or OED Director, or his or her designee. See § 11.39(b). Thus, where an employee of the Office is appointed under 35 U.S.C. 32 to conduct a disciplinary proceeding, the employee cannot be subject to first level or second level supervision by either the USPTO Director or OED Director, or his or her designee.

*Comment 48:* One comment suggested amending § 11.43 to provide for ''motions, including all prehearing motions commonly filed under the Federal Rules of Civil Procedure, shall be filed with the administrative law judge.''

Response: The suggestion presumably pertains to the first sentence of § 11.43, which provided that ''[m]otions shall be filed with the hearing officer.'' The

suggestion has been adopted to the extent that the phrase '', including all prehearing motions commonly filed under the Federal Rules of Civil Procedure, shall'' has been substituted for ''may'' in the first sentence of § 11.43. Inasmuch as this section, as well as sections 11.39, 11.41, and other sections, reference a hearing officer, the suggestion to limit the applicability of this section to an administrative law judge has not been accepted.

*Comment 49:* One comment urged that § 11.44 be amended to require an oral hearing before the hearing officer should the practitioner request one in writing. The comment suggested that a practitioner should have, and probably constitutionally does have, an absolute right to have a hearing to confront witnesses and present evidence.

Response: The comment that the hearing officer not have authority to overrule a practitioner's request for an oral hearing is unpersuasive. The argument presumes that there are genuine issues of material fact. Under § 11.44, an oral hearing would occur where there is a genuine issue of material fact. However, an oral hearing would be unnecessary where, for example, there is a settlement, or the practitioner fails to file an answer and the hearing officer enters an order default judgment. Similarly, an oral hearing is unnecessary if a summary judgment is appropriate and entered. ''The case law in this Circuit is clear that an agency is not required to hold an evidentiary hearing where it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though the statute provides for adjudicatory proceedings. The agency, however, carries a heavy burden of persuasion.'' *Indep. Bankers Assoc. of Georgia* v. *Bd. Of Governors of the Fed. Reserve System*, 516, F.2d 1206, 1120 (D.C. Cir. 1975). See also *Altenheim German Home* v. *Turnock*, 902 F.2d 582, 585 (7th Cir. 1990) (there is no right to an evidentiary hearing unless there is a genuine issue of material fact); *Consolidated Oil & Gas.* v. *FERC*, 806 F.2d 275, 279 (DC Cir. 1986) (quoting *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed. 455 (1972)) (''An agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved * * *''); *Puerto Rico Aqueduct Sewer Auth.* v. *USEPA*, 35 F.3d 600, 608 (1st Cir. 1994) (quoting *John D. Companos & Sons, Inc.* v. *FDA*, 854 F.2d 510, 552 (D.C. Cir. 1988)) ''Summary judgment may be entered not only for failure to comply with precise regulations, but also 'on the basis of manifest noncompliance with general statutory or regulatory provisions * * *' ''. Clearly, a practitioner who has entered into a settlement, failed to answer a properly served complaint, or failed to raise a genuine dispute of material facts should not have an absolute right to an oral hearing to confront witnesses and present evidence.

*Comment 50:* One comment stated that § 11.44(c) conflicts with long-standing policy of the American Bar Association that disciplinary proceedings be public. The policy is set forth in Rule 16(C) of the Model Rules of Lawyer Disciplinary Enforcement (MRLDE). Section 11.44(c) proposed that disciplinary proceedings, in effect, be public at the election of the respondent. The comment pointed out that mistrust that can develop when a governmental function is not functioning openly—even when it is functioning well. The comment acknowledged the need for confidentiality of matters prior to the filing and service of a petition for discipline to protect the respondent from publicity regarding unfounded accusations, that by keeping the investigative process confidential, the Office ensures that allegations of misconduct will continue to be thoroughly investigated and scrutinized, and that a case will not proceed if the allegations are frivolous or there is a lack of sufficient evidence of wrongdoing to warrant the initiation of disciplinary proceedings under §§ 11.32 and 11.34. The comment further stated that once a finding of probable cause has been made, there is no longer a danger that the allegations against the practitioner are frivolous. The comment also recommended the addition of provisions providing for the imposition of protective orders where necessary set forth in Rule 16(E) of the MRLDE to address valid concerns regarding confidential and privileged information.

Response: The recommendation to adopt the provisions of Rules 16(C) and 16(E) of the MRLDE has not been adopted. The recommended change is not a logical extension of the rule proposed in Supplemental Notice of Proposed Rule Making on February 28, 2007, in the **Federal Register** (72 FR 9196). However, the recommendation will be further considered and public comment solicited to address a rule that would adopt the provisions of Rules 16(C) and 16(E) of the MRLDE.

*Comment 51:* Two comments suggested that the hearing officer's authority to exclude evidence under § 11.50(a) should be expanded from excluding ''irrelevant, immaterial, or unduly repetitious'' evidence to authority to exclude evidence if its ''probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'' This is the standard that applies under Fed. R. Evid. 403. One comment suggested that the Federal Rules of Evidence should apply, given the final appeal to the U.S. District Court for the District of Columbia. Another comment suggested that the Office follow Rule 18 of the American Bar Association's Model Rules of Lawyer Disciplinary Enforcement to provide for the applicability of state rules of evidence in disciplinary proceedings, except as otherwise provided in the Office rules.

Response: The suggestions to modify § 11.50 have not been adopted. The language in § 11.50, ''Agency may exclude evidence that is irrelevant, immaterial, or unduly repetitious,'' is derived from 5 U.S.C. 556(d). The explanation the Office provided in 1985 for not adopting the same or similar suggestions still obtains and is reproduced below.

''The PTO has explained in both the advance notice (49 FR 10020, column 2) and the notice of proposed rule making (49 FR 33801, columns 1 and 2) why it cannot adopt the Federal Rules of Evidence in disciplinary cases. The 'Federal Rules of Evidence * * * do not apply to administrative proceedings * * *.' Davis, Administrative Law Treatise, § 14.01 (Supp. 1970). The controlling law is set out in 5 U.S.C. 556(d) which provides in part: 'Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by an[y] party and supported by and in accordance with the reliable, probative, and substantial evidence.' It appears to be the concern of some of the comments that the Administrative Procedure Act does not articulate an appropriate standard of evidence and that hearsay may be admitted. Suffice it to say that many adjudications occur daily under the Administrative Procedure Act, including disciplinary proceedings. The following language appearing in an opinion of the Eleventh Circuit in *TRW-United Greenfield Division* v. *National Labor Relations Board*, 716 F.2d 1391, 1994 (11th Cir. 1983), may be helpful:

''At the hearing the ALJ refused to allow five additional employees to testify that other employees 'told them that such a statement had been made. TRW contends it was denied a full and fair hearing by the exclusion of this testimony. The general rule is that administrative tribunals are not bound by the strict rules of evidence governing jury trials. *Opp Cotton Mills, Inc.* v. *Administrator of Wage & Hour Div.*, 312 U.S. 126, 155, 61 S.Ct. 524, 537, 85 L.Ed. 624 (1971). Thus, the admission of testimony which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 442, 50 S.Ct. 220, 225, 74 L.Ed. 524 (1930). But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 230, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). Therefore, the hearsay testimony of other employees would not have amounted to substantial evidence sufficient to support a finding for the company. We find that TRW was not denied a full and fair hearing by the judge's refusal to admit hearsay testimony.'

''See also *Steadman* v. *Securities and Exchange Commission*, 450 U.S. 91, 98 n.17 (1981); *Richardson* v. *Perales*, 402 U.S. 389, 410–411 (1971); *Brown* v. *Gamage*, 377 F.2d 154, 158 (D.C. Cir.), cert. denied, 389 U.S. 858 (1967); Annotation, *Hearsay Evidence In Proceedings Before Federal Administrative Agencies*, 6 ALR Fed 76 (1971); and Davis, *Hearsay in Administrative Proceedings*, 32 Geo. Wash. L. Rev. 689 (1964).''

*Comment 52:* One comment took issue with the last sentence of § 11.51(b), which permits the hearing officer to refuse to admit deposition testimony that both the OED Director and the practitioner agree is admissible. The comment suggested that the phrase ''Unless the parties agree otherwise,'' be placed at the beginning of the last sentence.

Response: The suggestion to permit deposition testimony to be entered into the record if the parties agree has not been adopted. The rules should not limit the ability of the hearing officer to handle the proceedings, especially if the officer finds a reasonable basis to believe that the demeanor of the witness is involved.

*Comment 53:* One comment objected to the provision in § 11.52(e) permitting the hearing officer to decide not to require pretrial disclosures of witnesses, exhibits, and the like. The comment urged that pre-trial disclosures should be mandatory absent either agreement of the parties to waive pre-trial disclosures or a showing of ''good cause'' by a party seeking to avoid them by replacing the phrase ''The hearing officer may'' with ''Absent good cause shown, the hearing officer shall''.

Response: The suggestion that § 11.52(e) be amended to remove the hearing officer's discretion to require pretrial disclosure has not been adopted. This section should not limit the ability of the hearing officer under § 11.39(c) to manage the hearing, including whether to require pretrial disclosures. In proceedings under former § 10.152(e), administrative law judges frequently required pretrial disclosures in proceedings. The provisions of § 11.52(e) are not inconsistent with some states.

*Comment 54:* One comment said that § 11.52(f), which provides that after a witness testifies for a party, if the opposing party requests, the party may be required to produce, prior to cross-examination, any documents relied upon by the witness in giving his or her testimony, is a burdensome discovery, which will only delay the proceedings, and suggested deletion of this section.

Response: The suggestion to delete § 11.52(f) has been adopted. In addition to the lack of a definition of ''written statement,'' the provision could be burdensome for both parties. For example, if a witness studied a ''written statement'' several days before the hearing and did not bring it to the proceeding, the hearing officer could grant a recess to allow the party to get the statement and provide the opposing party time to review the statement before the witness is cross-examined. The proceeding should not be so prolonged for each witness. However, the deletion of this subsection should not be construed as prohibiting the hearing officer from exercising discretion to assure a fair hearing. For example, after a witness testifies for a party, the hearing officer may grant the opposing party's motion, prior to cross-examination, to produce any documents the witness reviewed during direct examination or to refresh the witness's memory.

*Comment 55:* One comment suggested that the framework adopted by the American Bar Association in Rule 10(C) of the Model Rules of Lawyer Disciplinary Enforcement (MRLDE) for imposing lawyer sanctions replace the provisions of § 11.54(b) for imposing sanctions. The comment pointed out that the 1986 Standards for Imposing Lawyer Sanctions has been widely adopted and utilized in state disciplinary systems. Another comment suggested that due to inapplicability, each factor of § 11.54(b) should not be mechanically addressed, and the rule should reflect as much.

Response: The suggestion has been substantially adopted. The wide adoption and utilization of the framework of MRLDE Rule 10(C) in state disciplinary systems for imposing sanctions would benefit the Office by providing the precedent and consistency for imposing practitioner sanctions in the Office's discipline system that are necessary for fairness to the public and the practitioners. The provision of MRLDE Rule 10(C)(1), ''whether the practitioner has violated a duty owed to a client, to the public, to the legal system, or to the profession,'' has been substituted in § 11.54(b)(1) for ''[t]he public interest.'' The ''duty owed * * * to the public'' is inclusive of the ''[t]he public interest'' factor of former § 10.154(b)(1). The ''duty owed * * * to the legal system, or to the profession'' is broader than, but inclusive of, the ''integrity of the legal patent profession'' of former § 10.154(b)(4). The duty owed to the legal system and profession includes integrity with regard to the Office in patent, trademark and other non-patent matters, as well as duties beyond integrity owed to the entire legal system, including to the Office. The duty owed to ''a client'' introduces a new consideration to consider when imposing a sanction.

The provision of MRLDE Rule 10(C)(2), ''whether the practitioner acted intentionally, knowingly, or negligently,'' has been substituted in § 11.54(b)(2) for ''[t]he seriousness of the grounds for discipline.'' Actions committed intentionally, knowingly, or negligently implicitly are serious for a practitioner, and the substituted language is generally comparable in scope to the factor in former § 10.154(b). The substitution also provides the Office disciplinary system and courts with clear and well-understood actions to focus upon when imposing sanctions.

The provision of MRLDE Rule 10(C)(3), ''the amount of the actual or potential injury caused by the practitioner's misconduct,'' has replaced the factor of former § 11.54(b)(3), ''the deterrent effects deemed necessary.'' No one factor of MRLDE Rule 10(C) is expressed in terms of being a deterrent effect. Rather, all the factors together may have a deterrent effect.

The provision of MRLDE Rule 10(C)(4), ''[t]he existence of any aggravating or mitigating factors,'' has been substituted for the factor of former § 11.54(b)(4), ''any extenuating circumstances.'' The words ''mitigating factors'' are comparable with the ''extenuating circumstances'' of former § 10.54(b)(5). The inclusion of ''any aggravating * * * factor'' introduces a new consideration for imposing a sanction.

The Office concurs with the observation that inasmuch as all factors

do not necessarily obtain in each case, they need not be addressed. Therefore, § 11.54(b) provides for their consideration ''if applicable.''

In substantially adopting the framework of MRLDE Rule 10(C), the Office notes its anticipation that existing precedent applying the factors under former § 10.154(b) could still be relied upon with regard to the application of analogous factors in § 11.54(b). Also, in adopting this framework, it is appropriate that the Office present below the American Bar Association's commentary accompanying the standards. The commentary provides guidance that may and can be consulted and considered by the Office, courts, the OED Director and the representatives of the OED Director when imposing or recommending sanctions. The commentary that follows has been modified for applicability to disciplinary proceedings in the Office: These standards provide a framework to guide the courts and disciplinary agencies, including disciplinary counsel, in imposing sanctions, thereby providing the flexibility to select the appropriate sanction in each particular case of practitioner misconduct. The sanction imposed may depend on the presence of aggravating or mitigating factors. The following lists of aggravating and mitigating circumstances are found in Standard 9 of the American Bar Association's Standards for Imposing Lawyer Sanctions. Aggravating factors include: Prior disciplinary offenses; dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; submission of false evidence, false statements or other deceptive practices during disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; substantial experience in the practice of law; and indifference to making restitution. Mitigating factors include: absence of prior disciplinary record, absence of dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the practice of law; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions; remorse; and remoteness of prior offenses. The Standards for Imposing Lawyer Sanctions set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of practitioner misconduct. Use of the Standards will help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.

*Comment 56:* One comment stated that it appears that the USPTO Director's review of the hearing officer's decision is a *de novo* decision but the standard of the decision is not explicitly stated in § 11.56, and suggested clarifying the matter by inserting ''*de novo*'' between ''shall'' and ''decide,'' or specifying some other standard that is deemed appropriate.

Response: The suggestion to specify in § 11.56(a) that the decision of the USPTO Director, upon appeal from the initial decision of the hearing officer, is *de novo* has been adopted in part. Section 11.56(a) is revised to add a sentence providing that on appeal from the initial decision, the USPTO Director has authority to conduct a de novo review of the factual record. This is consistent with Administrative Procedure Act (APA). The Office is empowered by the APA, 5 U.S.C 551, *et seq.* to conduct an independent review of the factual record before it. ''On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.'' 5 U.S.C. 557(b).

*Comment 57:* One comment said that the Director's decision is not always as thorough as the hearing officer's decision, and suggested adding to § 11.56(a), maybe after the second sentence, ''The initial decision is adopted unless modified.''

Response: The suggestion to add a provision that the ''initial decision is adopted unless modified'' has not been adopted. The current practice is that each individual decision of the USPTO Director indicates those instances, and to what extent, the USPTO Director adopts the findings of fact and law of the administrative law judge hearing the matter. Under § 11.55(b), exceptions to the hearing officer's decision and supporting reasons must be included in the appeal if they are to be preserved. Therefore, the USPTO Director need not consider or adopt portions of the hearing officer's decision to which no exception has been filed. It is more prudent that the Office continue with that practice rather than change the rule.

*Comment 58:* One comment said that the duties set forth in § 11.58 that apply to lawyers who have resigned or who have been excluded or suspended should apply to lawyers placed on disability inactive status. Rule 27 of the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement provides that, in state disciplinary proceedings, a lawyer placed on disability inactive status must notify clients, co-counsel and opposing counsel of the transfer and must also comply with other notice, record retention and rules relating to withdrawal from cases and return of client property and fees. The comment noted that such notice is protective of clients.

Response: Section 11.28(a)(2) provides that a practitioner on disability inactive status ''shall comply with the provisions of § 11.58.'' Nevertheless, the recommendation that the duties set forth in § 11.58 that apply to lawyers who have resigned or who have been excluded or suspended should apply to lawyers placed on disability inactive status has been construed as suggesting that § 11.58 specifically reference those on disability inactive status. The suggestion has been adopted and expanded to all practitioners, lawyers as well as patent agents, on disability inactive status. Reference to a ''practitioner transferred to disability inactive status'' or ''transfer to disability inactive status,'' as appropriate, has been added to §§ 11.58(a), 11.58(b), 11.58(b)(1), 11.58(b)(1)(i), 11.58(b)(1)(ii), 11.58(b)(1)(iii), 11.58(b)(2)(vi), 11.58(c), 11.58(d), 11.58(e), 11.58(e)(1), 11.58(e)(3), 11.58(f), 11.58(f)(1)(i), 11.58(f)(1)(ii) and 11.58(f)(2)(ii). Further, the title of § 11.58 has been revised to be ''Duties of disciplined or resigned practitioner, or practitioner on disability inactive status.''

*Comment 59:* One comment regarding § 11.58(b)(1)(ii) doubted that the Office intended to require, for example, a large law firm to notify every client with business before the Office of the discipline or exclusion of a practitioner who, though designated by the firm through its customer number, nonetheless has no substantive involvement in prosecuting that client's application. The comment suggested that such notice should be required only if the practitioner was substantively involved, as in 37 CFR 1.56, in any business of the client before the Office.

Response: The suggestion to limit notification of suspension or exclusion to only those clients for whom the practitioner is substantively involved in prosecuting that client's application has not been adopted. It is the intent of the Office to require the practitioner, not the firm, to notify all clients the practitioner

represents having immediate or prospective business before the Office in patent, trademark and other non-patent matters of the order of exclusion, suspension or resignation and of the practitioner's consequent inability to act as a practitioner after the effective date of the order. Consistent with compliance with the ethical duties of the firm's members, the firm must enable the practitioner to notify the clients, for example, by identifying every client and every client's applications in which the practitioner, though designation by the firm's customer number(s), has a power of attorney or authorization of agent. The requirement obtains whenever and however the practitioner is given a power of attorney to represent the client. The Office appreciates that a firm may include all practitioners in the firm or all partners on every power of attorney, including appointment through use of a firm's customer number. The practitioner, by virtue of a power of attorney, may represent all clients who have appointed the practitioner, irrespective of whether the practitioner is substantively involved in the client's case. The practitioner may share in the fees the client pays to the firm, even if the practitioner is not substantively involved in the client's applications before the Office. The client is entitled to know whether a practitioner empowered to represent the client has been disciplined.

The Office does not require that a power of attorney filed in a patent or trademark application include an appointment of all practitioners who are partners or associates in firm. The power of attorney filed in a patent or trademark application may be limited to a particular practitioner or group of practitioners. In the latter case, a practitioner in a large firm who is given a power of attorney in only a small number of the firm's cases may comply with the provisions of § 11.58(b)(1)(ii) by providing notice only to the clients in a small number of cases from whom the practitioner received a power of attorney.

*Comment 60:* Two comments pointed out that § 11.58(b)(2)(vi) refers to ''§ 11.11(a),'' a designation not included in the July 2004 rules, and requested clarification.

Response: Section 11.58(b)(2)(vi) should have referenced ''§ 11.11'' because subsections have not been added to § 11.11 since it was adopted. Therefore, the reference has been changed to § 11.11.

*Comment 61:* One comment regarding § 11.58(b) observed that some suspended or excluded practitioners may not satisfy the conditions for reinstatement, and suggested adding a third provision, ''to provide tax records or other proof of employment during discipline period'' to § 10.160(c).

Response: The suggestion to add a subsection to § 11.58(b) requiring suspended and excluded practitioners to provide tax records or other proof of employment during the period the discipline period has not been adopted. A suspended and excluded practitioner is prohibited from ''engag[ing] in any practice of patent, trademark and other non-patent law before the Office.'' See § 11.58(a). The practitioner must ''not hold himself or herself out as authorized to practice law before the Office,'' § 11.58(b)(3); ''not advertise the practitioner's availability or ability to perform or render legal services for any person having immediate or prospective business before the Office,'' § 11.58(b)(4), and ''not render legal advice or services to any person having immediate or prospective business before the Office as to that business,'' § 11.58(b)(5). The practitioner seeking reinstatement has the burden of proof by clear and convincing evidence, and a practitioner who has violated any provision of § 11.58 is not eligible for reinstatement. See § 11.60(c). If the OED Director has good cause to believe a suspended or excluded practitioner has continued to practice before the Office after being ordered suspended or excluded, the rules are sufficiently broad to permit the OED Director to request records showing the sources of a practitioner's income and employment following the order of suspension or exclusion.

*Comment 62:* One comment recommended that § 11.59(a) be revised to include reports to the American Bar Association's National Lawyer Regulatory Data Bank (NLRDB), the only national repository of information concerning public disciplinary sanctions imposed against lawyers and other regulatory actions from all states and the District of Columbia, some Federal courts and some Federal agencies. The comment noted that the NLRDB has been receiving reports of public regulatory actions from the USPTO since 2001 and was referenced in the originally proposed rules under its former name, the National Discipline Data Bank.

Response: The recommendation to revise § 11.59(a) to specifically include reporting to the NLRB has not been adopted. It is not necessary for this section to specify every agency, institution or other member of the public to which reports are sent regarding the lawyers being disciplinarily sanctioned. The NLRB is within the scope of the public to whom public disciplinary sanctions imposed against lawyers have been and will continue to be reported.

*Comment 63:* One comment noted that § 11.59(c) provides that the affidavit that accompanies a request for exclusion on consent is confidential, while the order of exclusion is public. The comment recommended that the admissions leading to the sanction should be known inasmuch as the sanction imposed is public and keeping admissions private may serve to further public distrust of these proceedings. In support thereof, the comment noted that under Rules 21(E) and 10(D) of the American Bar Association's Model Rules of Disciplinary Enforcement, an affidavit accompanying a petition for discipline on consent that would result in a public sanction is public, unless covered by a protective order. The comment also noted that a disciplined practitioner is protected by the statement in § 11.59 (c) that the affidavit cannot be used in any other proceeding except by order of the USPTO Director or with the practitioner's written consent.

Response: The recommendation to revise § 11.59(c) to provide that admissions leading to the agreed upon sanction should be made known to the public unless covered by a protective order is adopted in part. This section is revised to provide that unless the USPTO Director orders that the proceeding or portion of the record be kept confidential, both the order excluding a practitioner and the affidavit required under § 11.27(a) will be available to the public. There are two exceptions. Information from the order or affidavit may be withheld as necessary to protect the privacy of third parties or as directed in a protective order under § 11.44(c). This section continues to provide that the affidavit shall not be used in any other proceeding except by order the USPTO Director or upon written consent of the practitioner.

*Comment 64:* One comment suggested that inasmuch as records regarding a warning are not to be made available to the public this be made clear by inserting into § 11.59(b) after ''be kept confidential'' the phrase ''or it concerns a warning issued under Section 11.21''.

Response: The suggestion to add the phrase ''or it concerns a warning issued under § 11.21'' to § 11.59(b) has not been adopted. The suggested phrase implies that matters concerning a warning are other than confidential and are protected only by reason of the suggested phrase. Section 11.59 need

not provide safeguards because information collected in an investigation is placed into a Privacy Act system of records, in this case COMMERCE/PAT–TM–2, Complaints, Investigations and Disciplinary Proceedings Relating to Registered Patent Attorneys and Agents, published at 70 FR 69522. Furthermore, the Privacy Act of 1974, 5 U.S.C. 552a, provides numerous protections for those records. Regarding the requests for release of these records under the Freedom of Information Act (FOIA), Privacy Act records may not be disclosed unless the subject of the record consents or one of twelve exceptions apply. One of the twelve exceptions provides for information that is releasable under FOIA. This is a statutory exception that cannot be altered by rule making. Generally, the information in investigation files, including warnings, is protected from disclosure by FOIA exemptions 5 and 6. See 5 U.S.C. 552(b)(5) and (6), respectively. Thus, information regarding a warning, including the warning, is among the collected information that is subject to the numerous protections of the Privacy Act, and will not be released to FOIA requesters as provided for under current Federal law.

*Comment 65:* One comment noted that some people may not have satisfied the conditions for reinstatement, and suggested adding ''(3) to provide tax records or other proof of employment during discipline period'' to § 11.60(c).

Response: The suggestion to add a provision to § 11.60(c) requiring suspended or excluded practitioners to provide tax records or other proof of employment during the period of discipline has not been adopted. An excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status is prohibited from practicing before the Office. See § 11.58(a). The practitioner must keep and maintain records of the steps taken under § 11.58 to provide proof in a subsequent proceeding, such as reinstatement, of compliance with the provisions of § 11.58. See § 11.58(d). The OED Director must seek evidence of compliance with § 11.58. See § 11.58(d). If the practitioner acts as a paralegal or performs services under § 11.58(e), to be reinstated the practitioner must file an affidavit explaining the acts performed in that capacity and show compliance with the provisions of § 11.58. See § 11.58(f). A practitioner who has violated any provision of § 11.58 is ineligible for reinstatement. See § 11.60(c). If the showing is insufficient, the OED Director may request additional showings, including, where appropriate, evidence of employment as a paralegal. The evidence sought may include any written employment agreement and income tax withholding statements for the relevant time period.

**Rule Making Considerations**

*Regulatory Flexibility Act*

The Deputy General Counsel for General Law, United States Patent and Trademark Office, certified to the Chief Counsel for Advocacy, Small Business Administration, that the changes in this final rule will not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)). The provisions of the Regulatory Flexibility Act relating to the preparation of a regulatory flexibility analysis are not applicable to this final rule because the rule will not have a significant economic impact on a substantial number of small entities. The primary purpose of the rule changes is to bring the USPTO's disciplinary procedural rules for practitioners in line with the American Bar Association Model Rules, American Bar Association Model Rules for Lawyer Disciplinary Enforcement, American Bar Association Model Federal Rules of Disciplinary Enforcement and rules adopted by other Federal agencies. This will ease the practitioners' burden in learning and complying with USPTO regulations.

The rule eliminates a fee of $130 for petitions in disciplinary cases to enable petitioners to invoke the supervisory authority of the USPTO Director.

The rule removes the $1500 cap on disciplinary proceeding costs that can be assessed, as a condition of reinstatement, against a practitioner who has been suspended or excluded from practice before the Office. Approximately five of the roughly 35,000 practitioners petition for reinstatement each year, and approximately two of these petitions occur under circumstances where disciplinary proceeding costs may be assessed. These changes, therefore, will not affect a substantial number of practitioners.

*Executive Order 13132*

This notice of proposed rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (August 4, 1999).

*Executive Order 12866*

This notice of proposed rule making has been determined to be not significant for purposes of Executive Order 12866 (September 30, 1993).

*Paperwork Reduction Act*

This notice of final rule making involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This notice of final rule making contains revisions that the United States Patent and Trademark Office (USPTO) is adopting to the rules governing the conduct of professional responsibility investigations and disciplinary proceedings. The principal impact of the changes in this notice of final rule making is on registered practitioners. The information collections involved in this final rule have been previously reviewed and approved by OMB under OMB control numbers 0651–0012 and 0651–0017. The revisions do not affect the information collection requirements for 0651–0012 and 0651–0017, so the USPTO is not resubmitting these collections to OMB for review and approval.

The title, description, and respondent description of the currently approved information collections for 0651–0012 and 0651–0017 are shown below with estimates of the annual reporting burdens. Included in the estimates is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information.

*OMB Number:* 0651–0012.

*Title:* Admittance to Practice and Roster of Registered Patent Attorneys and Agents Admitted to Practice Before the Patent and Trademark Office (USPTO).

*Form Numbers:* PTO–158, PTO–158A, PTO–275, PTO–107A, PTO–1209, PTO–2126, PTO–2149 and PTO–2150.

*Type of Review:* Approved through December of 2010.

*Affected Public:* Individuals or households, businesses or other for-profit, Federal Government, and state, local, or tribal governments.

*Estimated Number of Respondents:* 72,122.

*Estimated Time per Response:* 5 minutes to 40 hours.

*Estimated Total Annual Burden Hours:* 89,475 hours.

*Needs and Uses:* The information in this collection is necessary for the United States Patent and Trademark Office to comply with Federal regulations, 35 U.S.C. 2(B)(2)(d). The Office of Enrollment and Discipline collects this information to insure compliance with the USPTO Code of Professional Responsibility, 37 CFR 10.20–10.112. This Code requires that registered practitioners maintain

complete records of clients, including all funds, securities, and other properties of clients coming into his/her possession, and render appropriate accounts to the client regarding such records, as well as report violations of the Code to the USPTO. The registered practitioners are mandated by the Code to maintain proper documentation so that they can fully cooperate with an investigation in the event of a report of an alleged violation and so that violations are prosecuted as appropriate.

*OMB Number:* 0651-0017.

*Title:* Practitioner Records Maintenance, Disclosure, and Discipline Before the United States Patent and Trademark Office (USPTO).

*Form Numbers:* None.

*Type of Review:* Approved through July of 2010.

*Affected Public:* Individuals or households, businesses or other for-profit, Federal Government, and state, local, or tribal governments.

*Estimated Number of Respondents:* 532.

*Estimated Time per Response:* 2 hours to 60 hours.

*Estimated Total Annual Burden Hours:* 10,402 hours.

*Needs and Uses:* The information in this collection is necessary for the United States Patent and Trademark Office to comply with Federal regulations, 35 U.S.C. 6(a) and 35 U.S.C. 2(B)(2)(d). The Office of Enrollment and Discipline collects this information to insure compliance with the USPTO Code of Professional Responsibility, 37 CFR 10.20–10.112. This Code requires that registered practitioners maintain complete records of clients, including all funds, securities, and other properties of clients coming into his/her possession, and render appropriate accounts to the client regarding such records, as well as report violations of the Code to the USPTO. The registered practitioners are mandated by the Code to maintain proper documentation so that they can fully cooperate with an investigation in the event of a report of an alleged violation and so that violations are prosecuted as appropriate.

Comments are invited on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Harry I. Moatz, Director of Enrollment and Discipline, Mail Stop OED-Ethics Rules, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450, or to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the United States Patent and Trademark Office.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

**List of Subjects**

*37 CFR Part 1*

Administrative practice and procedure, Patents.

*37 CFR Part 2*

Administrative practice and procedure, Trademarks.

*37 CFR Part 7*

Administrative practice and procedure, International registration, Trademarks.

*37 CFR Part 10*

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

*37 CFR Part 11*

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

*37 CFR Part 41*

Administrative practice and procedure, Inventions and patents, Lawyers.

■ For the reasons set forth in the preamble, the United States Patent and Trademark Office is amending 37 CFR parts 1, 2, 7, 10, 11 and 41 as follows:

## PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2)(D).

■ 2. In § 1.4, revise paragraphs (d)(3) and (d)(4)(i), and add paragraph (d)(4)(ii)(C) to read as follows:

**§ 1.4 Nature of correspondence and signature requirements.**

* * * * *

(d) * * *

(3) *Forms.* The Office provides forms to the public to use in certain situations to assist in the filing of correspondence for a certain purpose and to meet certain requirements for patent applications and proceedings. Use of the forms for purposes for which they were not designed is prohibited. No changes to certification statements on the Office forms (*e.g.*, oath or declaration forms, terminal disclaimer forms, petition forms, and nonpublication request form) may be made. The existing text of a form, other than a certification statement, may be modified, deleted, or added to, if all text identifying the form as an Office form is removed. The presentation to the Office (whether by signing, filing, submitting, or later advocating) of any Office form with text identifying the form as an Office form by a party, whether a practitioner or non-practitioner, constitutes a certification under § 11.18(b) of this chapter that the existing text and any certification statements on the form have not been altered other than permitted by EFS-Web customization.

(4) *Certifications.* (i) *Section 11.18 certifications:* The presentation to the Office (whether by signing, filing, submitting, or later advocating) of any paper by a party, whether a practitioner or non-practitioner, constitutes a certification under § 11.18(b) of this subchapter. Violations of § 11.18(b)(2) of this subchapter by a party, whether a practitioner or non-practitioner, may result in the imposition of sanctions under § 11.18(c) of this subchapter. Any practitioner violating § 11.18(b) of this subchapter may also be subject to disciplinary action. *See* §§ 11.18(d) and 11.804(b)(9) of this subchapter.

(ii) * * *

(C) *Sanctions:* Violations of the certifications as to the signature of another or a person's own signature, set forth in paragraphs (d)(4)(ii)(A) and (B) of this section, may result in the imposition of sanctions under § 11.18(c) and (d) of this chapter.

* * * * *

■ 3. Revise § 1.8(a)(2)(iii)(A) to read as follows:

**§ 1.8 Certificate of mailing or transmission.**

(a) * * *

(2) * * *

(iii) * * *

(A) Correspondence filed in connection with a disciplinary

proceeding under part 11 of this chapter.

* * * * *

■ 4. Revise § 1.9(j) to read as follows:

**§ 1.9 Definitions.**

* * * * *

(j) Director as used in this chapter, except for part 11 of this chapter, means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

* * * * *

## PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 5. The authority citation for 37 CFR part 2 continues to read as follows:

**Authority:** 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 6. Revise § 2.2(c) to read as follows:

**§ 2.2 Definitions.**

* * * * *

(c) *Director* as used in this chapter, except for part 10 and part 11, means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

* * * * *

■ 7. Revise § 2.11 to read as follows:

**§ 2.11 Applicants may be represented by an attorney.**

Representation before the Office is governed by § 11.14 of this chapter. The Office cannot aid in the selection of an attorney.

■ 8. Revise § 2.17(a) through (c) to read as follows:

**§ 2.17 Recognition for representation.**

(a) When an attorney as defined in § 11.1 of this chapter acting in a representative capacity appears in person or signs a document in practice before the United States Patent and Trademark Office in a trademark case, his or her personal appearance or signature shall constitute a representation to the United States Patent and Trademark Office that, under the provisions of § 11.14 and the law, he or she is authorized to represent the particular party in whose behalf he or she acts. Further proof of authority to act in a representative capacity may be required.

(b) Before any non-lawyer, as specified in § 11.14(b) of this chapter, will be allowed to take action of any kind with respect to an application, registration or proceeding, a written authorization from the applicant, registrant, party to the proceeding, or other person entitled to prosecute such application or proceeding must be filed.

(c) To be recognized as a representative, an attorney as defined in § 11.1 of this chapter may file a power of attorney, appear in person, or sign a document on behalf of an applicant or registrant that is filed with the Office in a trademark case.

* * * * *

■ 9. Revise § 2.18(a) to read as follows:

**§ 2.18 Correspondence, with whom held.**

(a) If an attorney transmits documents, or a written power of attorney is filed, the Office will send correspondence to the attorney transmitting the documents, or to the attorney designated in the power of attorney, provided that the attorney is an attorney as defined in § 11.1 of this chapter.

* * * * *

■ 10. Revise § 2.19(b) to read as follows:

**§ 2.19 Revocation of power of attorney; withdrawal.**

* * * * *

(b) If the requirements of § 10.40 of this chapter are met, an attorney authorized under § 11.14 to represent an applicant, registrant or party in a trademark case may withdraw upon application to and approval by the Director.

■ 11. Revise § 2.24 to read as follows:

**§ 2.24 Designation of domestic representative by foreign applicant.**

If an applicant is not domiciled in the United States, the applicant may designate by a document filed in the United States Patent and Trademark Office the name and address of some person resident in the United States on whom may be served notices or process in proceedings affecting the mark. If the applicant does not file a document designating the name and address of a person resident in the United States on whom may be served notices or process in proceedings affecting the mark, or if the last person designated cannot be found at the address given in the designation, then notices or process in proceedings affecting the mark may be served on the Director. The mere designation of a domestic representative does not authorize the person designated to prosecute the application unless qualified under paragraph (a), (b) or (c) of § 11.14 of this subchapter and authorized under § 2.17(b).

■ 12. Revise § 2.33(a)(3) to read as follows:

**§ 2.33 Verified statement.**

(a) * * *

(3) An attorney as defined in § 11.1 of this chapter who has an actual or implied written or verbal power of attorney from the applicant.

* * * * *

■ 13. Revise § 2.101(b) introductory text to read as follows:

**§ 2.101 Filing an opposition.**

* * * * *

(b) Any person who believes that he, she or it would be damaged by the registration of a mark on the Principal Register may file an opposition addressed to the Trademark Trial and Appeal Board and must serve a copy of the opposition, including any exhibits, on the attorney of record for the applicant or, if there is no attorney, on the applicant or on the applicant's domestic representative, if one has been appointed, at the correspondence address of record in the Office. The opposer must include with the opposition proof of service pursuant to § 2.119 at the correspondence address of record in the Office. If any service copy of the opposition is returned to the opposer as undeliverable, the opposer must notify the Board within ten days of receipt of the returned copy. The opposition need not be verified, but must be signed by the opposer or the opposer's attorney, as specified in § 11.1 of this chapter, or other authorized representative, as specified in § 11.14(b) of this chapter. Electronic signatures pursuant to § 2.193(c)(1)(iii) are required for oppositions filed through ESTTA under paragraphs (b)(1) or (2) of this section.

* * * * *

■ 14. Revise § 2.102(a) introductory text to read as follows:

**§ 2.102 Extension of time for filing an opposition.**

(a) Any person who believes that he, she or it would be damaged by the registration of a mark on the Principal Register may file in the Office a written request, addressed to the Trademark Trial and Appeal Board, to extend the time for filing an opposition. The written request need not be verified, but must be signed by the potential opposer or by the potential opposer's attorney, as specified in § 11.1 of this chapter, or authorized representative, as specified in § 11.14(b) of this chapter. Electronic signatures pursuant to § 2.193(c)(1)(iii) are required for electronically filed extension requests.

* * * * *

■ 15. Revise § 2.105(b)(1) and (c)(1) to read as follows:

**§ 2.105 Notification to parties of opposition proceeding(s).**

* * * * *

(b) * * *

(1) If the opposition is transmitted by an attorney, or a written power of attorney is filed, the Board will send the notification to the attorney transmitting the opposition or to the attorney designated in the power of attorney, provided that the person is an ''attorney'' as defined in § 11.1 of this chapter.

(c) * * *

(1) If the opposed application contains a clear indication that the application is being prosecuted by an attorney, as defined in § 11.1 of this chapter, the Board shall send the documents described in this section to applicant's attorney.

* * * * *

■ 16. Revise § 2.111(b) to read as follows:

**§ 2.111 Filing petition for cancellation.**

* * * * *

(b) Any person who believes that he, she or it is or will be damaged by a registration may file a petition, addressed to the Trademark Trial and Appeal Board, for cancellation of the registration in whole or in part. Petitioner must serve a copy of the petition, including any exhibits, on the owner of record for the registration, or on the owner's domestic representative of record, if one has been appointed, at the correspondence address of record in the Office. The petitioner must include with the petition for cancellation proof of service, pursuant to § 2.119, on the owner of record, or on the owner's domestic representative of record, if one has been appointed, at the correspondence address of record in the Office. If any service copy of the petition for cancellation is returned to the petitioner as undeliverable, the petitioner must notify the Board within ten days of receipt of the returned copy. The petition for cancellation need not be verified, but must be signed by the petitioner or the petitioner's attorney, as specified in § 11.1 of this chapter, or other authorized representative, as specified in § 11.14(b) of this chapter. Electronic signatures pursuant to § 2.193(c)(1)(iii) are required for petitions submitted electronically via ESTTA. The petition for cancellation may be filed at any time in the case of registrations on the Supplemental Register or under the Act of 1920, or registrations under the Act of 1881 or the Act of 1905 which have not been published under section 12(c) of the Act, or on any ground specified in section 14(3) or (5) of the Act. In all other cases, the petition for cancellation and the required fee must be filed within five years from the date of registration of the mark under the Act or from the date of publication under section 12(c) of the Act.

* * * * *

■ 17. Revise § 2.113(b)(1) to read as follows:

**§ 2.113 Notification of cancellation proceeding.**

* * * * *

(b) * * *

(1) If the petition for cancellation is transmitted by an attorney, or a written power of attorney is filed, the Board will send the notification to the attorney transmitting the petition for cancellation or to the attorney designated in the power of attorney, provided that person is an ''attorney'' as defined in § 11.1 of this chapter.

* * * * *

■ 18. Revise § 2.119(d) to read as follows:

**§ 2.119 Service and signing of papers.**

* * * * *

(d) If a party to an *inter partes* proceeding is not domiciled in the United States and is not represented by an attorney or other authorized representative located in the United States, the party may designate by document filed in the United States Patent and Trademark Office the name and address of a person resident in the United States on whom may be served notices or process in the proceeding. If the party has appointed a domestic representative, official communications of the United States Patent and Trademark Office will be addressed to the domestic representative unless the proceeding is being prosecuted by an attorney at law or other qualified person duly authorized under § 11.14(c) of this subchapter. If the party has not appointed a domestic representative and the proceeding is not being prosecuted by an attorney at law or other qualified person, the Office will send correspondence directly to the party, unless the party designates in writing another address to which correspondence is to be sent. The mere designation of a domestic representative does not authorize the person designated to prosecute the proceeding unless qualified under § 11.14(a), or qualified under § 11.14(b) and authorized under § 2.17(b).

* * * * *

■ 19. Revise § 2.161(b)(3) to read as follows:

**§ 2.161 Requirements for a complete affidavit or declaration of continued use or excusable nonuse.**

* * * * *

(b) * * *

(3) An attorney as defined in § 11.1 of this chapter who has an actual or implied written or verbal power of attorney from the owner.

* * * * *

■ 20. Revise § 2.193(c)(2) to read as follows:

**§ 2.193 Trademark correspondence and signature requirements.**

* * * * *

(c) * * *

(2) The presentation to the Office (whether by signing, filing, submitting, or later advocating) of any document by a party, whether a practitioner or non-practitioner, constitutes a certification under § 11.18(b) of this chapter. Violations of § 11.18(b)(2) of this chapter by a party, whether a practitioner or non-practitioner, may result in the imposition of sanctions under § 11.18(c) of this chapter. Any practitioner violating § 11.18(b) may also be subject to disciplinary action. See §§ 11.18(d) and 11.23(c)(15).

* * * * *

## PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

■ 21. The authority citation for 37 CFR part 7 continues to read as follows:

**Authority:** 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 22. Revise § 7.25(a) to read as follows:

**§ 7.25 Sections of part 2 applicable to extension of protection.**

(a) Except for §§ 2.22, 2.23, 2.130, 2.131, 2.160 through 2.166, 2.168, 2.173, 2.175, 2.181 through 2.186 and 2.197, all sections in part 2 and all sections in parts 10 and all sections in part 11 of this chapter shall apply to an extension of protection of an international registration to the United States, including sections related to proceedings before the Trademark Trial and Appeal Board, unless otherwise stated.

* * * * *

■ 23. Revise § 7.37(b)(3) to read as follows:

**§ 7.37 Requirements for a complete affidavit or declaration of use in commerce or excusable nonuse.**

* * * * *

(b) * * *

(3) An attorney as defined in § 11.1 of this chapter who has an actual written or verbal power of attorney or an implied power of attorney from the holder.

* * * * *

## PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

■ 24. The authority citation for 37 CFR part 10 continues to read as follows:

**Authority:** 5 U.S.C. 500; 15 U.S.C. 1123; 35 U.S.C. 2, 6, 32, 41.

■ 25. The undesignated center heading, ''Individuals Entitled to Practice Before the Patent and Trademark Office,'' is removed.

### § 10.14 [Removed and reserved]

■ 26. Section 10.14 is removed and reserved.

### § 10.15 [Removed and reserved]

■ 27. Section 10.15 is removed and reserved.

### § 10.18 [Removed and reserved]

■ 28. Section 10.18 is removed and reserved.

■ 29. The undesignated center heading ''Investigations and Disciplinary Proceedings'' is removed.

### § 10.130–10.145 [Removed and reserved]

■ 30. Sections 10.130 through 10.145 are removed and reserved.

### § 10.149–10.161 [Removed and reserved]

■ 31. Sections 10.149 through 10.161 are removed and reserved.

### § 10.170 [Removed and reserved]

■ 32. Section 10.170 is removed and reserved.

## PART 11—REPRESENTATION OF OTHERS BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE

■ 33. The authority citation for 37 CFR part 11 continues to read as follows:

**Authority:** 5 U.S.C. 500, 15 U.S.C. 1123, 35 U.S.C. 2(b)(2), 32.

■ 34. Amend § 11.1 to add the definitions of ''Disqualified,'' ''Federal program,'' ''Federal agency,'' ''Mandatory Disciplinary Rule,'' and ''Serious crime,'' and revise the definitions of ''Attorney or lawyer'' and ''State'' as follows:

### § 11.1 Definitions.

* * * * *

*Attorney or lawyer* means an individual who is a member in good standing of the highest court of any State, including an individual who is in good standing of the highest court of one State and not under an order of any court or Federal agency suspending, enjoining, restraining, disbarring or otherwise restricting the attorney from practice before the bar of another State or Federal agency. A *non-lawyer* means a person who is not an attorney or lawyer.

* * * * *

*Disqualified* means any action that prohibits a practitioner from participating in or appearing before the program or agency, regardless of how long the prohibition lasts or the specific terminology used.

*Federal agency* means any authority of the executive branch of the Government of the United States.

*Federal program* means any program established by an Act of Congress or administered by a Federal agency.

* * * * *

*Mandatory Disciplinary Rule* is a rule identified in § 10.20(b) of this chapter as a Disciplinary Rule.

* * * * *

*Serious crime* means:

(1) Any criminal offense classified as a felony under the laws of the United States, any state or any foreign country where the crime occurred; or

(2) Any crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the crime occurred, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a ''serious crime.''

* * * * *

*State* means any of the 50 states of the United States of America, the District of Columbia, and any Commonwealth or territory of the United States of America.

* * * * *

■ 35. Revise §§ 11.2(a), (b)(4), (c) and (d) and add paragraphs (b)(5), (b)(6) and (e) to read as follows:

### § 11.2 Director of the Office of Enrollment and Discipline.

(a) *Appointment.* The USPTO Director shall appoint a Director of the Office of Enrollment and Discipline (OED Director). In the event of a vacancy in the office of the OED Director, the USPTO Director may designate an employee of the Office to serve as acting OED Director. The OED Director shall be an active member in good standing of the bar of the highest court of a State.

(b) * * *

(4) Conduct investigations of matters involving possible grounds for discipline of practitioners coming to the attention of the OED Director. Except in matters meriting summary dismissal, no disposition under § 11.22(h) shall be recommended or undertaken by the OED Director until the accused practitioner shall have been afforded an opportunity to respond to a reasonable inquiry by the OED Director.

(5) With the consent of a panel of three members of the Committee on Discipline, initiate disciplinary proceedings under § 11.32 and perform such other duties in connection with investigations and disciplinary proceedings as may be necessary.

(6) Oversee the preliminary screening of information and close investigations as provided for in § 11.22.

(c) *Petition to OED Director regarding enrollment or recognition.* Any petition from any action or requirement of the staff of OED reporting to the OED Director shall be taken to the OED Director accompanied by payment of the fee set forth in § 1.21(a)(5)(i) of this chapter. Any such petition not filed within sixty days from the mailing date of the action or notice from which relief is requested will be dismissed as untimely. The filing of a petition will neither stay the period for taking other action which may be running, nor stay other proceedings. The petitioner may file a single request for reconsideration of a decision within thirty days of the date of the decision. Filing a request for reconsideration stays the period for seeking review of the OED Director's decision until a final decision on the request for reconsideration is issued. A final decision by the OED Director may be reviewed in accordance with the provisions of paragraph (d) of this section.

(d) *Review of OED Director's decision regarding enrollment or recognition.* A party dissatisfied with a final decision of the OED Director regarding enrollment or recognition may seek review of the decision upon petition to the USPTO Director accompanied by payment of the fee set forth in § 1.21(a)(5)(ii) of this chapter. Any such petition to the USPTO Director waives a right to seek reconsideration from the OED Director. Any petition not filed within thirty days after the final decision of the OED Director may be dismissed as untimely. Briefs or memoranda, if any, in support of the petition shall accompany the petition. The petition will be decided on the basis of the record made before the OED

Director. The USPTO Director in deciding the petition will consider no new evidence. Copies of documents already of record before the OED Director shall not be submitted with the petition. An oral hearing will not be granted except when considered necessary by the USPTO Director. Any request for reconsideration of the decision of the USPTO Director may be dismissed as untimely if not filed within thirty days after the date of said decision.

(e) *Petition to USPTO Director in disciplinary matters.* Petition may be taken to the USPTO Director to invoke the supervisory authority of the USPTO Director in appropriate circumstances in disciplinary matters. Any such petition must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Briefs or memoranda, if any, in support of the petition must accompany the petition. Where facts are to be proven, the proof in the form of affidavits or declarations (and exhibits, if any) must accompany the petition. The OED Director may be directed by the USPTO Director to file a reply to the petition, supplying a copy to the petitioner. An oral hearing will not be granted except when considered necessary by the USPTO Director. The mere filing of a petition will not stay an investigation, disciplinary proceeding or other proceedings. Any petition under this part not filed within thirty days of the mailing date of the action or notice from which relief is requested may be dismissed as untimely. Any request for reconsideration of the decision of the USPTO Director may be dismissed as untimely if not filed within thirty days after the date of said decision.

■ 36. Revise § 11.3 to read as follows:

**§ 11.3 Suspension of rules.**

(a) In an extraordinary situation, when justice requires, any requirement of the regulations of this Part which is not a requirement of statute may be suspended or waived by the USPTO Director or the designee of the USPTO Director, *sua sponte,* or on petition by any party, including the OED Director or the OED Director's representative, subject to such other requirements as may be imposed.

(b) No petition under this section shall stay a disciplinary proceeding unless ordered by the USPTO Director or a hearing officer.

## Subpart B—Recognition to Practice Before the USPTO

■ 37. Revise § 11.5 to read as follows:

**§ 11.5 Register of attorneys and agents in patent matters; practice before the Office.**

(a) A register of attorneys and agents is kept in the Office on which are entered the names of all individuals recognized as entitled to represent applicants having prospective or immediate business before the Office in the preparation and prosecution of patent applications. Registration in the Office under the provisions of this part shall entitle the individuals so registered to practice before the Office only in patent matters.

(b) *Practice before the Office.* Practice before the Office includes, but is not limited to, law-related service that comprehends any matter connected with the presentation to the Office or any of its officers or employees relating to a client's rights, privileges, duties, or responsibilities under the laws or regulations administered by the Office for the grant of a patent or registration of a trademark, or for enrollment or disciplinary matters. Such presentations include preparing necessary documents in contemplation of filing the documents with the Office, corresponding and communicating with the Office, and representing a client through documents or at interviews, hearings, and meetings, as well as communicating with and advising a client concerning matters pending or contemplated to be presented before the Office. Nothing in this section proscribes a practitioner from employing or retaining non-practitioner assistants under the supervision of the practitioner to assist the practitioner in matters pending or contemplated to be presented before the Office.

(1) *Practice before the Office in patent matters.* Practice before the Office in patent matters includes, but is not limited to, preparing and prosecuting any patent application, consulting with or giving advice to a client in contemplation of filing a patent application or other document with the Office, drafting the specification or claims of a patent application; drafting an amendment or reply to a communication from the Office that may require written argument to establish the patentability of a claimed invention; drafting a reply to a communication from the Office regarding a patent application; and drafting a communication for a public use, interference, reexamination proceeding, petition, appeal to or any other proceeding before the Board of Patent Appeals and Interferences, or other proceeding. Registration to practice before the Office in patent cases sanctions the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications or other proceeding before the Office involving a patent application or patent in which the practitioner is authorized to participate. The services include:

(i) Considering the advisability of relying upon alternative forms of protection which may be available under state law, and

(ii) Drafting an assignment or causing an assignment to be executed for the patent owner in contemplation of filing or prosecution of a patent application for the patent owner, where the practitioner represents the patent owner after a patent issues in a proceeding before the Office, and when drafting the assignment the practitioner does no more than replicate the terms of a previously existing oral or written obligation of assignment from one person or party to another person or party.

(2) *Practice before the Office in trademark matters.* Practice before the Office in trademark matters includes, but is not limited to, consulting with or giving advice to a client in contemplation of filing a trademark application or other document with the Office; preparing and prosecuting an application for trademark registration; preparing an amendment which may require written argument to establish the registrability of the mark; and conducting an opposition, cancellation, or concurrent use proceeding; or conducting an appeal to the Trademark Trial and Appeal Board.

**§ 11.12–11.13 [Added and Reserved]**

■ 38. Add and reserve §§ 11.12 and 11.13.

■ 39. Add §§ 11.14 and 11.15 to read as follows:

**§ 11.14 Individuals who may practice before the Office in trademark and other non-patent matters.**

(a) *Attorneys.* Any individual who is an attorney as defined in § 11.1 may represent others before the Office in trademark and other non-patent matters. An attorney is not required to apply for registration or recognition to practice before the Office in trademark and other non-patent matters. Registration as a patent practitioner does not itself entitle an individual to practice before the Office in trademark matters.

(b) *Non-lawyers.* Individuals who are not attorneys are not recognized to practice before the Office in trademark and other non-patent matters, except that individuals not attorneys who were recognized to practice before the Office in trademark matters under this chapter prior to January 1, 1957, will be

recognized as agents to continue practice before the Office in trademark matters. Except as provided in the preceding sentence, registration as a patent agent does not itself entitle an individual to practice before the Office in trademark matters.

(c) *Foreigners.* Any foreign attorney or agent not a resident of the United States who shall file a written application for reciprocal recognition under paragraph (f) of this section and prove to the satisfaction of the OED Director that he or she is registered or in good standing before the patent or trademark office of the country in which he or she resides and practices and is possessed of good moral character and reputation, may be recognized for the limited purpose of representing parties located in such country before the Office in the presentation and prosecution of trademark matters, provided: the patent or trademark office of such country allows substantially reciprocal privileges to those permitted to practice in trademark matters before the Office. Recognition under this paragraph shall continue only during the period that the conditions specified in this paragraph obtain.

(d) Recognition of any individual under this section shall not be construed as sanctioning or authorizing the performance of any act regarded in the jurisdiction where performed as the unauthorized practice of law.

(e) No individual other than those specified in paragraphs (a), (b), and (c) of this section will be permitted to practice before the Office in trademark matters on behalf of a client. Any individual may appear in a trademark or other non-patent matter in his or her own behalf. Any individual may appear in a trademark matter for:

(1) A firm of which he or she is a member,

(2) A partnership of which he or she is a partner, or

(3) A corporation or association of which he or she is an officer and which he or she is authorized to represent, if such firm, partnership, corporation, or association is a party to a trademark proceeding pending before the Office.

(f) *Application for reciprocal recognition.* An individual seeking reciprocal recognition under paragraph (c) of this section, in addition to providing evidence satisfying the provisions of paragraph (c) of this section, shall apply in writing to the OED Director for reciprocal recognition, and shall pay the application fee required by § 1.21(a)(1)(i) of this subchapter.

**§ 11.15 Refusal to recognize a practitioner.**

Any practitioner authorized to appear before the Office may be suspended, excluded, or reprimanded in accordance with the provisions of this Part. Any practitioner who is suspended or excluded under this Part shall not be entitled to practice before the Office in patent, trademark, or other non-patent matters while suspended or excluded.

**§ 11.16–11.17 [Added and Reserved]**

■ 40. Add and reserve §§ 11.16 and 11.17.

■ 41. Add § 11.18 to read as follows:

**§ 11.18 Signature and certificate for correspondence filed in the Office.**

(a) For all documents filed in the Office in patent, trademark, and other non-patent matters, and all documents filed with a hearing officer in a disciplinary proceeding, except for correspondence that is required to be signed by the applicant or party, each piece of correspondence filed by a practitioner in the Office must bear a signature, personally signed by such practitioner, in compliance with § 1.4(d)(1) of this subchapter.

(b) By presenting to the Office or hearing officer in a disciplinary proceeding (whether by signing, filing, submitting, or later advocating) any paper, the party presenting such paper, whether a practitioner or non-practitioner, is certifying that—

(1) All statements made therein of the party's own knowledge are true, all statements made therein on information and belief are believed to be true, and all statements made therein are made with the knowledge that whoever, in any matter within the jurisdiction of the Office, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or knowingly and willfully makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001 and any other applicable criminal statute, and violations of the provisions of this section may jeopardize the probative value of the paper; and

(2) To the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(i) The paper is not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or needless increase in the cost of any proceeding before the Office;

(ii) The other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(iii) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(iv) The denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief.

(c) Violations of any of paragraphs (b)(2)(i) through (iv) of this section are, after notice and reasonable opportunity to respond, subject to such sanctions or actions as deemed appropriate by the USPTO Director, which may include, but are not limited to, any combination of—

(1) Striking the offending paper;

(2) Referring a practitioner's conduct to the Director of Enrollment and Discipline for appropriate action;

(3) Precluding a party or practitioner from submitting a paper, or presenting or contesting an issue;

(4) Affecting the weight given to the offending paper; or

(5) Terminating the proceedings in the Office.

(d) Any practitioner violating the provisions of this section may also be subject to disciplinary action.

■ 42. Part 11 is amended to add subpart C to read as follows:

**Subpart C—Investigations and Disciplinary Proceedings; Jurisdiction, Sanctions, Investigations, and Proceedings**

Sec.

## Subpart C—Investigations and Disciplinary Proceedings; Jurisdiction, Sanctions, Investigations, and Proceedings

### § 11.19 Disciplinary jurisdiction; Jurisdiction to transfer to disability inactive status.

(a) All practitioners engaged in practice before the Office; all practitioners administratively suspended; all practitioners registered to practice before the Office in patent cases; all practitioners inactivated; all practitioners authorized under § 11.6(d) to take testimony; and all practitioners transferred to disability inactive status, reprimanded, suspended, or excluded from the practice of law by a duly constituted authority, including by the USPTO Director, are subject to the disciplinary jurisdiction of the Office. Practitioners who have resigned shall also be subject to such jurisdiction with respect to conduct undertaken prior to the resignation and conduct in regard to any practice before the Office following the resignation.

(b) *Grounds for discipline; Grounds for transfer to disability inactive status.* The following, whether done individually by a practitioner or in concert with any other person or persons and whether or not done in the course of providing legal services to a client, or in a matter pending before the Office, constitute grounds for discipline or grounds for transfer to disability inactive status.

(1) Grounds for discipline include:

(i) Conviction of a serious crime;

(ii) Discipline on ethical grounds imposed in another jurisdiction or disciplinary disqualification from participating in or appearing before any Federal program or agency;

(iii) Failure to comply with any order of a Court disciplining a practitioner, or any final decision of the USPTO Director in a disciplinary matter;

(iv) Violation of a Mandatory Disciplinary Rule identified in § 10.20(b) of Part 10 of this Subchapter; or

(v) Violation of the oath or declaration taken by the practitioner. See § 11.8.

(2) Grounds for transfer to disability inactive status include:

(i) Being transferred to disability inactive status in another jurisdiction;

(ii) Being judicially declared incompetent, being judicially ordered to be involuntarily committed after a hearing on the grounds of insanity, incompetency or disability, or being placed by court order under guardianship or conservatorship; or

(iii) Filing a motion requesting a disciplinary proceeding be held in abeyance because the practitioner is suffering from a disability or addiction that makes it impossible for the practitioner to adequately defend the charges in the disciplinary proceeding.

(c) Petitions to disqualify a practitioner in *ex parte* or *inter partes* matters in the Office are not governed by §§ 11.19 through 11.60 and will be handled on a case-by-case basis under such conditions as the USPTO Director deems appropriate.

(d) The OED Director may refer the existence of circumstances suggesting unauthorized practice of law to the authorities in the appropriate jurisdiction(s).

### § 11.20 Disciplinary sanctions; Transfer to disability inactive status.

(a) *Types of discipline.* The USPTO Director, after notice and opportunity for a hearing, and where grounds for discipline exist, may impose on a practitioner the following types of discipline:

(1) Exclusion from practice before the Office;

(2) Suspension from practice before the Office for an appropriate period of time;

(3) Reprimand or censure; or

(4) *Probation.* Probation may be imposed *in lieu* of or in addition to any other disciplinary sanction. Any conditions of probation shall be stated in writing in the order imposing probation. The order shall also state whether, and to what extent, the practitioner shall be required to notify clients of the probation. The order shall establish procedures for the supervision of probation. Violation of any condition of probation shall be cause for the probation to be revoked, and the disciplinary sanction to be imposed for the remainder of the probation period. Revocation of probation shall occur only after an order to show cause why probation should not be revoked is resolved adversely to the practitioner.

(b) *Conditions imposed with discipline.* When the USPTO Director imposes discipline, the practitioner may be required to make restitution either to persons financially injured by the practitioner's conduct or to an appropriate client's security trust fund, or both, as a condition of probation or of reinstatement. Such restitution shall be limited to the return of unearned practitioner fees or misappropriated client funds. Any other reasonable condition may also be imposed, including a requirement that the practitioner take and pass a professional responsibility examination.

(c) *Transfer to disability inactive status.* The USPTO Director, after notice and opportunity for a hearing may, and where grounds exist to believe a practitioner has been transferred to disability inactive status in another jurisdiction, or has been judicially declared incompetent; judicially ordered to be involuntarily committed after a hearing on the grounds of incompetency or disability, or placed by court order under guardianship or conservatorship, transfer the practitioner to disability inactive status.

### § 11.21 Warnings.

A warning is neither public nor a disciplinary sanction. The OED Director may conclude an investigation with the issuance of a warning. The warning shall contain a brief statement of facts and Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10 of this Subchapter relevant to the facts.

### § 11.22 Investigations.

(a) The OED Director is authorized to investigate possible grounds for discipline. An investigation may be initiated when the OED Director receives a grievance, information or evidence from any source suggesting possible grounds for discipline. Neither unwillingness nor neglect by a grievant to prosecute a charge, nor settlement, compromise, or restitution with the grievant, shall in itself justify abatement of an investigation.

(b) Any person possessing information or evidence concerning possible grounds for discipline of a practitioner may report the information or evidence to the OED Director. The OED Director may request that the report be presented in the form of an affidavit or declaration.

(c) Information or evidence coming from any source which presents or alleges facts suggesting possible grounds for discipline of a practitioner will be deemed a grievance.

(d) *Preliminary screening of information or evidence.* The OED Director shall examine all information or evidence concerning possible grounds for discipline of a practitioner.

(e) *Notification of investigation.* The OED Director shall notify the practitioner in writing of the initiation of an investigation into whether a practitioner has engaged in conduct constituting possible grounds for discipline.

(f) *Request for information and evidence by OED Director.*

(1) In the course of the investigation, the OED Director may request information and evidence regarding possible grounds for discipline of a practitioner from:

(i) The grievant,

(ii) The practitioner, or

(iii) Any person who may reasonably be expected to provide information and evidence needed in connection with the grievance or investigation.

(2) The OED Director may request information and evidence regarding possible grounds for discipline of a practitioner from a non-grieving client either after obtaining the consent of the practitioner or upon a finding by a Contact Member of the Committee on Discipline, appointed in accordance with § 11.23(d), that good cause exists to believe that the possible ground for discipline alleged has occurred with respect to non-grieving clients. Neither a request for, nor disclosure of, such information shall constitute a violation of any of the Mandatory Disciplinary Rules identified in § 10.20(b) of this subchapter.

(g) Where the OED Director makes a request under paragraph (f)(2) of this section to a Contact Member of the Committee on Discipline, such Contact Member shall not, with respect to the practitioner connected to the OED Director's request, participate in the Committee on Discipline panel that renders a probable cause determination under paragraph (b)(1) of this section concerning such practitioner, and that forwards the probable cause finding and recommendation to the OED Director under paragraph (b)(2) of this section.

(h) *Disposition of investigation.* Upon the conclusion of an investigation, the OED Director may:

(1) Close the investigation without issuing a warning, or taking disciplinary action;

(2) Issue a warning to the practitioner;

(3) Institute formal charges upon the approval of the Committee on Discipline; or

(4) Enter into a settlement agreement with the practitioner and submit the same for approval of the USPTO Director.

(i) *Closing investigation without issuing a warning or taking disciplinary action.* The OED Director shall terminate an investigation and decline to refer a matter to the Committee on Discipline if the OED Director determines that:

(1) The information or evidence is unfounded;

(2) The information or evidence relates to matters not within the jurisdiction of the Office;

(3) As a matter of law, the conduct about which information or evidence has been obtained does not constitute grounds for discipline, even if the conduct may involve a legal dispute; or

(4) The available evidence is insufficient to conclude that there is probable cause to believe that grounds exist for discipline.

### § 11.23 Committee on Discipline.

(a) The USPTO Director shall appoint a Committee on Discipline. The Committee on Discipline shall consist of at least three employees of the Office. None of the Committee members shall report directly or indirectly to the OED Director or any employee designated by the USPTO Director to decide disciplinary matters. Each Committee member shall be a member in good standing of the bar of the highest court of a State. The Committee members shall select a Chairperson from among themselves. Three Committee members will constitute a panel of the Committee.

(b) *Powers and duties of the Committee on Discipline.* The Committee shall have the power and duty to:

(1) Meet in panels at the request of the OED Director and, after reviewing evidence presented by the OED Director, by majority vote of the panel, determine whether there is probable cause to bring charges under § 11.32 against a practitioner; and

(2) Prepare and forward its own probable cause findings and recommendations to the OED Director.

(c) No discovery shall be authorized of, and no member of the Committee on Discipline shall be required to testify about deliberations of, the Committee on Discipline or of any panel.

(d) The Chairperson shall appoint the members of the panels and a Contact Member of the Committee on Discipline.

### § 11.24 Reciprocal discipline.

(a) *Notification of OED Director.* Within thirty days of being publicly censured, publicly reprimanded, subjected to probation, disbarred or suspended by another jurisdiction, or being disciplinarily disqualified from participating in or appearing before any Federal program or agency, a practitioner subject to the disciplinary jurisdiction of the Office shall notify the OED Director in writing of the same. A practitioner is deemed to be disbarred if he or she is disbarred, excluded on consent, or has resigned in lieu of a disciplinary proceeding. Upon receiving notification from any source or otherwise learning that a practitioner subject to the disciplinary jurisdiction of the Office has been so publicly censured, publicly reprimanded, subjected to probation, disbarred, suspended or disciplinarily disqualified, the OED Director shall obtain a certified copy of the record or order regarding the public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification and file the same with the USPTO Director. The OED Director shall, in addition, without Committee on Discipline authorization, file with the USPTO Director a complaint complying with § 11.34 against the practitioner predicated upon the public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification. The OED Director shall request the USPTO Director to issue a notice and order as set forth in paragraph (b) of this section.

(b) *Notification served on practitioner.* Upon receipt of a certified copy of the record or order regarding the practitioner being so publicly censured, publicly reprimanded, subjected to probation, disbarred, suspended or disciplinarily disqualified together with the complaint, the USPTO Director shall issue a notice directed to the practitioner in accordance with § 11.35 and to the OED Director containing:

(1) A copy of the record or order regarding the public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification;

(2) A copy of the complaint; and

(3) An order directing the practitioner to file a response with the USPTO Director and the OED Director, within forty days of the date of the notice establishing a genuine issue of material fact predicated upon the grounds set forth in paragraphs (d)(1)(i) through (d)(1)(iv) of this section that the imposition of the identical public censure, public reprimand, probation, disbarment, suspension or disciplinary

disqualification would be unwarranted and the reasons for that claim.

(c) *Effect of stay in another jurisdiction.* In the event the public censure, public reprimand, probation, disbarment, suspension imposed by another jurisdiction or disciplinary disqualification imposed in the Federal program or agency has been stayed, any reciprocal discipline imposed by the USPTO may be deferred until the stay expires.

(d) *Hearing and discipline to be imposed.* (1) The USPTO Director shall hear the matter on the documentary record unless the USPTO Director determines that an oral hearing is necessary. After expiration of the forty days from the date of the notice pursuant to provisions of paragraph (b) of this section, the USPTO Director shall consider any timely filed response and shall impose the identical public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification unless the practitioner clearly and convincingly demonstrates, and the USPTO Director finds there is a genuine issue of material fact that:

(i) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(ii) There was such infirmity of proof establishing the conduct as to give rise to the clear conviction that the Office could not, consistently with its duty, accept as final the conclusion on that subject;

(iii) The imposition of the same public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification by the Office would result in grave injustice; or

(iv) Any argument that the practitioner was not publicly censured, publicly reprimanded, placed on probation, disbarred, suspended or disciplinarily disqualified.

(2) If the USPTO Director determines that there is no genuine issue of material fact, the USPTO Director shall enter an appropriate final order. If the USPTO Director is unable to make such determination because there is a genuine issue of material fact, the USPTO Director shall enter an appropriate order:

(i) Referring the complaint to a hearing officer for a formal hearing and entry of an initial decision in accordance with the other rules in this part, and

(ii) Directing the practitioner to file an answer to the complaint in accordance with § 11.36.

(e) *Adjudication in another jurisdiction or Federal agency or program.* In all other respects, a final adjudication in another jurisdiction or Federal agency or program that a practitioner, whether or not admitted in that jurisdiction, has been guilty of misconduct shall establish a prima facie case by clear and convincing evidence that the practitioner violated 37 CFR 10.23, as further identified under 37 CFR 10.23(c)(5), (or any successor regulation identifying such public censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification as a basis for a disciplinary proceeding in this Office).

(f) *Reciprocal discipline—action where practice has ceased.* Upon request by the practitioner, reciprocal discipline may be imposed *nunc pro tunc* only if the practitioner promptly notified the OED Director of his or her censure, public reprimand, probation, disbarment, suspension or disciplinary disqualification in another jurisdiction, and establishes by clear and convincing evidence that the practitioner voluntarily ceased all activities related to practice before the Office and complied with all provisions of § 11.58. The effective date of any public censure, public reprimand, probation, suspension, disbarment or disciplinary disqualification imposed *nunc pro tunc* shall be the date the practitioner voluntarily ceased all activities related to practice before the Office and complied with all provisions of § 11.58.

(g) *Reinstatement following reciprocal discipline proceeding.* A practitioner may petition for reinstatement under conditions set forth in § 11.60 no sooner than completion of the period of reciprocal discipline imposed, and compliance with all provisions of § 11.58.

**§ 11.25 Interim suspension and discipline based upon conviction of committing a serious crime.**

(a) *Notification of OED Director.* Upon being convicted of a crime in a court of the United States or any State, or violating a criminal law of a foreign country, a practitioner subject to the disciplinary jurisdiction of the Office shall notify the OED Director in writing of the same within thirty days from the date of such conviction. Upon being advised or learning that a practitioner subject to the disciplinary jurisdiction of the Office has been convicted of a crime, the OED Director shall make a preliminary determination whether the crime constitutes a serious crime warranting interim suspension. If the crime is a serious crime, the OED Director shall file with the USPTO Director proof of the conviction and request the USPTO Director to issue a notice and order set forth in paragraph (b)(2) of this section. The OED Director shall in addition, without Committee on Discipline authorization, file with the USPTO Director a complaint against the practitioner complying with § 11.34 predicated upon the conviction of a serious crime. If the crime is not a serious crime, the OED Director shall process the matter in the same manner as any other information or evidence of a possible violation of a Mandatory Disciplinary Rule identified in § 10.20(b) of this subchapter coming to the attention of the OED Director.

(b) *Interim suspension and referral for disciplinary proceeding.* All proceedings under this section shall be handled as expeditiously as possible.

(1) The USPTO Director has authority to place a practitioner on interim suspension after hearing the request for interim suspension on the documentary record.

(2) *Notification served on practitioner.* Upon receipt of a certified copy of the court record, docket entry or judgment demonstrating that the practitioner has been so convicted together with the complaint, the USPTO Director shall forthwith issue a notice directed to the practitioner in accordance with §§ 11.35(a), (b) or (c), and to the OED Director, containing:

(i) A copy of the court record, docket entry, or judgment of conviction;

(ii) A copy of the complaint; and

(iii) An order directing the practitioner to file a response with the USPTO Director and the OED Director, within forty days of the date of the notice, establishing that there is a genuine issue of material fact that the crime did not constitute a serious crime, the practitioner is not the individual found guilty of the crime, or that the conviction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

(3) *Hearing and final order on request for interim suspension.* The request for interim suspension shall be heard by the USPTO Director on the documentary record unless the USPTO Director determines that the practitioner's response establishes a genuine issue of material fact that: The crime did not constitute a serious crime, the practitioner is not the person who committed the crime, or that the conviction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process. If the USPTO Director determines that there is no genuine issue of material fact regarding the defenses set forth in the preceding sentence, the USPTO Director shall enter an appropriate final order regarding the OED Director's request for interim suspension regardless of the

pendency of any criminal appeal. If the USPTO Director is unable to make such determination because there is a genuine issue of material fact, the USPTO Director shall enter a final order dismissing the request and enter a further order referring the complaint to a hearing officer for a hearing and entry of an initial decision in accordance with the other rules in this part and directing the practitioner to file an answer to the complaint in accordance with § 11.36.

(4) *Termination.* The USPTO Director has authority to terminate an interim suspension. In the interest of justice, the USPTO Director may terminate an interim suspension at any time upon a showing of extraordinary circumstances, after affording the OED Director an opportunity to respond to the request to terminate interim suspension.

(5) *Referral for disciplinary proceeding.* Upon entering a final order imposing interim suspension, the USPTO Director shall refer the complaint to a hearing officer to conduct a formal disciplinary proceeding. The formal disciplinary proceeding, however, shall be stayed by the hearing officer until all direct appeals from the conviction are concluded. Review of the initial decision of the hearing officer shall be pursuant to § 11.55.

(c) *Proof of conviction and guilt*—(1) *Conviction in the United States.* For purposes of a hearing for interim suspension and a hearing on the formal charges in a complaint filed as a consequence of the conviction, a certified copy of the court record, docket entry, or judgment of conviction in a court of the United States or any State shall establish a prima facie case by clear and convincing evidence that the practitioner was convicted of a serious crime and that the conviction was not lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

(2) *Conviction in a foreign country.* For purposes of a hearing for interim suspension and on the formal charges filed as a result of a finding of guilt, a certified copy of the court record, docket entry, or judgment of conviction in a court of a foreign country shall establish a *prima facie* case by clear and convincing evidence that the practitioner was convicted of a serious crime and that the conviction was not lacking in notice or opportunity to be heard as to constitute a deprivation of due process. However, nothing in this paragraph shall preclude the practitioner from demonstrating by clear and convincing evidence in any hearing on a request for interim suspension there is a genuine issue of material fact to be considered when determining if the elements of a serious crime were committed in violating the criminal law of the foreign country and whether a disciplinary sanction should be entered.

(d) *Crime determined not to be serious crime.* If the USPTO Director determines that the crime is not a serious crime, the complaint shall be referred to the OED Director for investigation under § 11.22 and processing as is appropriate.

(e) *Reinstatement*—(1) *Upon reversal or setting aside a finding of guilt or a conviction.* If a practitioner suspended solely under the provisions of paragraph (b) of this section demonstrates that the underlying finding of guilt or conviction of serious crimes has been reversed or vacated, the order for interim suspension shall be vacated and the practitioner shall be placed on active status unless the finding of guilt was reversed or the conviction was set aside with respect to less than all serious crimes for which the practitioner was found guilty or convicted. The vacating of the interim suspension will not terminate any other disciplinary proceeding then pending against the practitioner, the disposition of which shall be determined by the hearing officer before whom the matter is pending, on the basis of all available evidence other than the finding of guilt or conviction.

(2) *Following conviction of a serious crime.* Any practitioner convicted of a serious crime and disciplined in whole or in part in regard to that conviction, may petition for reinstatement under conditions set forth in § 11.60 no sooner than five years after being discharged following completion of service of his or her sentence, or after completion of service under probation or parole, whichever is later.

(f) *Notice to clients and others of interim suspension.* An interim suspension under this section shall constitute a suspension of the practitioner for the purpose of § 11.58.

### § 11.26 Settlement.

Before or after a complaint under § 11.34 is filed, a settlement conference may occur between the OED Director and the practitioner. Any offers of compromise and any statements made during the course of settlement discussions shall not be admissible in subsequent proceedings. The OED Director may recommend to the USPTO Director any settlement terms deemed appropriate, including steps taken to correct or mitigate the matter forming the basis of the action, or to prevent recurrence of the same or similar conduct. A settlement agreement shall be effective only upon entry of a final decision by the USPTO Director.

### § 11.27 Exclusion on consent.

(a) *Required affidavit.* The OED Director may confer with a practitioner concerning possible violations by the practitioner of the Rules of Professional Conduct whether or not a disciplinary proceeding has been instituted. A practitioner who is the subject of an investigation or a pending disciplinary proceeding based on allegations of grounds for discipline, and who desires to resign, may only do so by consenting to exclusion and delivering to the OED Director an affidavit declaring the consent of the practitioner to exclusion and stating:

(1) That the practitioner's consent is freely and voluntarily rendered, that the practitioner is not being subjected to coercion or duress, and that the practitioner is fully aware of the implications of consenting to exclusion;

(2) That the practitioner is aware that there is currently pending an investigation into, or a proceeding involving allegations of misconduct, the nature of which shall be specifically set forth in the affidavit to the satisfaction of the OED Director;

(3) That the practitioner acknowledges that, if and when he or she applies for reinstatement under § 11.60, the OED Director will conclusively presume, for the limited purpose of determining the application for reinstatement, that:

(i) The facts upon which the investigation or complaint is based are true, and

(ii) The practitioner could not have successfully defended himself or herself against the allegations in the investigation or charges in the complaint.

(b) *Action by the USPTO Director.* Upon receipt of the required affidavit, the OED Director shall file the affidavit and any related papers with the USPTO Director for review and approval. Upon such approval, the USPTO Director will enter an order excluding the practitioner on consent and providing other appropriate actions. Upon entry of the order, the excluded practitioner shall comply with the requirements set forth in § 11.58.

(c) When an affidavit under paragraph (a) of this section is received after a complaint under § 11.34 has been filed, the OED Director shall notify the hearing officer. The hearing officer shall enter an order transferring the disciplinary proceeding to the USPTO Director, who may enter an order excluding the practitioner on consent.

(d) *Reinstatement.* Any practitioner excluded on consent under this section may not petition for reinstatement for five years. A practitioner excluded on consent who intends to reapply for admission to practice before the Office must comply with the provisions of § 11.58, and apply for reinstatement in accordance with § 11.60. Failure to comply with the provisions of § 11.58 constitutes grounds for denying an application for reinstatement.

**§ 11.28 Incapacitated practitioners in a disciplinary proceeding.**

(a) *Holding in abeyance a disciplinary proceeding because of incapacitation due to a current disability or addiction*—(1) *Practitioner's motion.* In the course of a disciplinary proceeding under § 11.32, but before the date set by the hearing officer for a hearing, the practitioner may file a motion requesting the hearing officer to enter an order holding such proceeding in abeyance based on the contention that the practitioner is suffering from a disability or addiction that makes it impossible for the practitioner to adequately defend the charges in the disciplinary proceeding.

(i) *Content of practitioner's motion.* The practitioner's motion shall, in addition to any other requirement of § 11.43, include or have attached thereto:

(A) A brief statement of all material facts;

(B) Affidavits, medical reports, official records, or other documents and the opinion of at least one medical expert setting forth and establishing any of the material facts on which the practitioner is relying;

(C) A statement that the practitioner acknowledges the alleged incapacity by reason of disability or addiction;

(D) Written consent that the practitioner be transferred to disability inactive status if the motion is granted; and

(E) A written agreement by the practitioner to not practice before the Office in patent, trademark or other non-patent cases while on disability inactive status.

(ii) *Response.* The OED Director's response to any motion hereunder shall be served and filed within thirty days after service of the practitioner's motion unless such time is shortened or enlarged by the hearing officer for good cause shown, and shall set forth the following:

(A) All objections, if any, to the actions requested in the motion;

(B) An admission, denial or allegation of lack of knowledge with respect to each of the material facts in the practitioner's motion and accompanying documents; and

(C) Affidavits, medical reports, official records, or other documents setting forth facts on which the OED Director intends to rely for purposes of disputing or denying any material fact set forth in the practitioner's papers.

(2) *Disposition of practitioner's motion.* The hearing officer shall decide the motion and any response thereto. The motion shall be granted upon a showing of good cause to believe the practitioner to be incapacitated as alleged. If the required showing is made, the hearing officer shall enter an order holding the disciplinary proceeding in abeyance. In the case of addiction to drugs or intoxicants, the order may provide that the practitioner will not be returned to active status absent satisfaction of specified conditions. Upon receipt of the order, the OED Director shall transfer the practitioner to disability inactive status, give notice to the practitioner, cause notice to be published, and give notice to appropriate authorities in the Office that the practitioner has been placed on disability inactive status. The practitioner shall comply with the provisions of § 11.58, and shall not engage in practice before the Office in patent, trademark and other non-patent law until a determination is made of the practitioner's capability to resume practice before the Office in a proceeding under paragraph (c) or paragraph (d) of this section. A practitioner on disability inactive status must seek permission from the OED Director to engage in an activity authorized under § 11.58(e). Permission will be granted only if the practitioner has complied with all the conditions of §§ 11.58(a) through 11.58(d) applicable to disability inactive status. In the event that permission is granted, the practitioner shall fully comply with the provisions of § 11.58(e).

(b) *Motion for reactivation.* Any practitioner transferred to disability inactive status in a disciplinary proceeding may file with the hearing officer a motion for reactivation once a year beginning at any time not less than one year after the initial effective date of inactivation, or once during any shorter interval provided by the order issued pursuant to paragraph (a)(2) of this section or any modification thereof. If the motion is granted, the disciplinary proceeding shall resume under such schedule as may be established by the hearing officer.

(c) *Contents of motion for reactivation.* A motion by the practitioner for reactivation alleging that a practitioner has recovered from a prior disability or addiction shall be accompanied by all available medical reports or similar documents relating thereto. The hearing officer may require the practitioner to present such other information as is necessary.

(d) *OED Director's motion to resume disciplinary proceeding held in abeyance.* (1) The OED Director, having good cause to believe a practitioner is no longer incapacitated, may file a motion requesting the hearing officer to terminate a prior order holding in abeyance any pending proceeding because of the practitioner's disability or addiction. The hearing officer shall decide the matter presented by the OED Director's motion hereunder based on the affidavits and other admissible evidence attached to the OED Director's motion and the practitioner's response. The OED Director bears the burden of showing by clear and convincing evidence that the practitioner is able to defend himself or herself. If there is any genuine issue as to one or more material facts, the hearing officer will hold an evidentiary hearing.

(2) The hearing officer, upon receipt of the OED Director's motion under paragraph (d)(1) of this section, may direct the practitioner to file a response. If the hearing officer requires the practitioner to file a response, the practitioner must present clear and convincing evidence that the prior self-alleged disability or addiction continues to make it impossible for the practitioner to defend himself or herself in the underlying proceeding being held in abeyance.

(e) *Action by the hearing officer.* If, in deciding a motion under paragraph (b) or (d) of this section, the hearing officer determines that there is good cause to believe the practitioner is not incapacitated from defending himself or herself, or is not incapacitated from practicing before the Office, the hearing officer shall take such action as is deemed appropriate, including the entry of an order directing the reactivation of the practitioner and resumption of the disciplinary proceeding.

**§ 11.29 Reciprocal transfer or initial transfer to disability inactive status.**

(a) *Notification of OED Director.* (1) Transfer to disability inactive status in another jurisdiction as grounds for reciprocal transfer by the Office. Within thirty days of being transferred to disability inactive status in another jurisdiction, a practitioner subject to the disciplinary jurisdiction of the Office shall notify the OED Director in writing of the transfer. Upon notification from any source that a practitioner subject to the disciplinary jurisdiction of the

Office has been transferred to disability inactive status in another jurisdiction, the OED Director shall obtain a certified copy of the order. The OED Director shall file with the USPTO Director:

(i) The order;

(ii) A request that the practitioner be transferred to disability inactive status, including the specific grounds therefor; and

(iii) A request that the USPTO Director issue a notice and order as set forth in paragraph (b) of this section.

(2) *Involuntary commitment, adjudication of incompetency or court ordered placement under guardianship or conservatorship as grounds for initial transfer to disability inactive status.* Within thirty days of being judicially declared incompetent, being judicially ordered to be involuntarily committed after a hearing on the grounds of incompetency or disability, or being placed by court order under guardianship or conservatorship in another jurisdiction, a practitioner subject to the disciplinary jurisdiction of the Office shall notify the OED Director in writing of such judicial action. Upon notification from any source that a practitioner subject to the disciplinary jurisdiction of the Office has been subject to such judicial action, the OED Director shall obtain a certified copy of the order. The OED Director shall file with the USPTO Director:

(i) The order;

(ii) A request that the practitioner be transferred to disability inactive status, including the specific grounds therefor; and

(iii) A request that the USPTO Director issue a notice and order as set forth in paragraph (b) of this section.

(b) *Notice served on practitioner.* Upon receipt of a certified copy of an order or declaration issued by another jurisdiction demonstrating that a practitioner subject to the disciplinary jurisdiction of the Office has been transferred to disability inactive status, judicially declared incompetent, judicially ordered to be involuntarily committed after a judicial hearing on the grounds of incompetency or disability, or placed by court order under guardianship or conservatorship, together with the OED Director's request, the USPTO Director shall issue a notice, comporting with § 11.35, directed to the practitioner containing:

(1) A copy of the order or declaration from the other jurisdiction,

(2) A copy of the OED Director's request; and

(3) An order directing the practitioner to file a response with the USPTO Director and the OED Director, within 30 days from the date of the notice, establishing a genuine issue of material fact supported by an affidavit and predicated upon the grounds set forth in § 11.29(d) (1) through (4) that a transfer to disability inactive status would be unwarranted and the reasons therefor.

(c) *Effect of stay of transfer, judicially declared incompetence, judicially ordered involuntarily commitment on the grounds of incompetency or disability, or court-ordered placement under guardianship or conservatorship.* In the event the transfer, judicially declared incompetence, judicially ordered involuntary commitment on the grounds of incompetency or disability, or court-ordered placement under guardianship or conservatorship in the other jurisdiction has been stayed there, any reciprocal transfer or transfer by the Office may be deferred until the stay expires.

(d) *Hearing and transfer to disability inactive status.* The request for transfer to disability inactive status shall be heard by the USPTO Director on the documentary record unless the USPTO Director determines that there is a genuine issue of material fact, in which case the USPTO Director may deny the request. Upon the expiration of 30 days from the date of the notice pursuant to the provisions of paragraph (b) of this section, the USPTO Director shall consider any timely filed response and impose the identical transfer to disability inactive status based on the practitioner's transfer to disability status in another jurisdiction, or shall transfer the practitioner to disability inactive status based on judicially declared incompetence, judicially ordered involuntary commitment on the grounds of incompetency or disability, or court-ordered placement under guardianship or conservatorship, unless the practitioner demonstrates by clear and convincing evidence, or the USPTO Director finds there is a genuine issue of material fact by clear and convincing evidence that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(2) There was such infirmity of proof establishing the transfer to disability status, judicial declaration of incompetence, judicial order for involuntary commitment on the grounds of incompetency or disability, or placement by court order under guardianship or conservatorship that the USPTO Director could not, consistent with Office's duty, accept as final the conclusion on that subject;

(3) The imposition of the same disability status or transfer to disability status by the USPTO Director would result in grave injustice; or

(4) The practitioner is not the individual transferred to disability status, judicially declared incompetent, judicially ordered for involuntary commitment on the grounds of incompetency or disability, or placed by court order under guardianship or conservatorship.

(5) If the USPTO Director determines that there is no genuine issue of material fact with regard to any of the elements of paragraphs (d)(1) through (4) of this section, the USPTO Director shall enter an appropriate final order. If the USPTO Director is unable to make that determination because there is a genuine issue of material fact, the USPTO Director shall enter an appropriate order dismissing the OED Director's request for such reason.

(e) *Adjudication in other jurisdiction.* In all other aspects, a final adjudication in another jurisdiction that a practitioner be transferred to disability inactive status, is judicially declared incompetent, is judicially ordered to be involuntarily committed on the grounds of incompetency or disability, or is placed by court order under guardianship or conservatorship shall establish the disability for purposes of a reciprocal transfer to or transfer to disability status before the Office.

(f) A practitioner who is transferred to disability inactive status under this section shall be deemed to have been refused recognition to practice before the Office for purposes of 35 U.S.C. 32.

(g) *Order imposing reciprocal transfer to disability inactive status or order imposing initial transfer to disability inactive status.* An order by the USPTO Director imposing reciprocal transfer to disability inactive status, or transferring a practitioner to disability inactive status shall be effective immediately, and shall be for an indefinite period until further order of the USPTO Director. A copy of the order transferring a practitioner to disability inactive status shall be served upon the practitioner, the practitioner's guardian, and/or the director of the institution to which the practitioner has been committed in the manner the USPTO Director may direct. A practitioner reciprocally transferred or transferred to disability inactive status shall comply with the provisions of § 11.58, and shall not engage in practice before the Office in patent, trademark and other non-patent law unless and until reinstated to active status.

(h) *Confidentiality of proceeding; Orders to be public*—(1) *Confidentiality of proceeding.* All proceedings under this section involving allegations of disability of a practitioner shall be kept confidential until and unless the

USPTO Director enters an order reciprocally transferring or transferring the practitioner to disability inactive status.

(2) *Orders to be public.* The OED Director shall publicize any reciprocal transfer to disability inactive status or transfer to disability inactive status in the same manner as for the imposition of public discipline.

(i) *Employment of practitioners on disability inactive status.* A practitioner on disability inactive status must seek permission from the OED Director to engage in an activity authorized under § 11.58(e). Permission will be granted only if the practitioner has complied with all the conditions of §§ 11.58(a) through 11.58(d) applicable to disability inactive status. In the event that permission is granted, the practitioner shall fully comply with the provisions of § 11.58(e).

(j) *Reinstatement from disability inactive status.* (1) *Generally.* No practitioner reciprocally transferred or transferred to disability inactive status under this section may resume active status except by order of the OED Director.

(2) *Petition.* A practitioner reciprocally transferred or transferred to disability inactive status shall be entitled to petition the OED Director for transfer to active status once a year, or at whatever shorter intervals the USPTO Director may direct in the order transferring or reciprocally transferring the practitioner to disability inactive status or any modification thereof.

(3) *Examination.* Upon the filing of a petition for transfer to active status, the OED Director may take or direct whatever action is deemed necessary or proper to determine whether the incapacity has been removed, including a direction for an examination of the practitioner by qualified medical or psychological experts designated by the OED Director. The expense of the examination shall be paid and borne by the practitioner.

(4) *Required disclosure, waiver of privilege.* With the filing of a petition for reinstatement to active status, the practitioner shall be required to disclose the name of each psychiatrist, psychologist, physician and hospital or other institution by whom or in which the practitioner has been examined or treated for the disability since the transfer to disability inactive status. The practitioner shall furnish to the OED Director written consent to the release of information and records relating to the incapacity if requested by the OED Director.

(5) *Learning in the law, examination.* The OED Director may direct that the practitioner establish proof of competence and learning in law, which proof may include passing the registration examination.

(6) *Granting of petition for transfer to active status.* The OED Director shall grant the petition for transfer to active status upon a showing by clear and convincing evidence that the incapacity has been removed.

(7) *Reinstatement in other jurisdiction.* If a practitioner is reciprocally transferred to disability inactive status on the basis of a transfer to disability inactive status in another jurisdiction, the OED Director may dispense with further evidence that the disability has been removed and may immediately direct reinstatement to active status upon such terms as are deemed proper and advisable.

(8) *Judicial declaration of competency.* If a practitioner is transferred to disability inactive status on the basis of a judicially declared incompetence, judicially ordered involuntary commitment on the grounds of incompetency or disability, or court-ordered placement under guardianship or conservatorship has been declared to be competent, the OED Director may dispense with further evidence that the incapacity to practice law has been removed and may immediately direct reinstatement to active status.

**§§ 11.30–11.31 [Reserved]**

**§ 11.32 Instituting a disciplinary proceeding.**

If after conducting an investigation under § 11.22(a), the OED Director is of the opinion that grounds exist for discipline under §§ 11.19(b)(3) through (5), the OED Director, after complying where necessary with the provisions of 5 U.S.C. 558(c), shall convene a meeting of a panel of the Committee on Discipline. The panel of the Committee on Discipline shall then determine as specified in § 11.23(b) whether a disciplinary proceeding shall be instituted. If the panel of the Committee on Discipline determines that probable cause exists to bring charges under §§ 11.19(b)(3) through (5), the OED Director shall institute a disciplinary proceeding by filing a complaint under § 11.34.

**§ 11.33 [Reserved]**

**§ 11.34 Complaint.**

(a) A complaint instituting a disciplinary proceeding under §§ 11.25(b)(4) or 11.32 shall:

(1) Name the practitioner who may then be referred to as the ''respondent'';

(2) Give a plain and concise description of the respondent's alleged grounds for discipline;

(3) State the place and time, not less than thirty days from the date the complaint is filed, for filing an answer by the respondent;

(4) State that a decision by default may be entered if an answer is not timely filed by the respondent; and

(5) Be signed by the OED Director.

(b) A complaint will be deemed sufficient if it fairly informs the respondent of any grounds for discipline, and where applicable, the Mandatory Disciplinary Rules identified in § 10.20(b) of this subchapter that form the basis for the disciplinary proceeding so that the respondent is able to adequately prepare a defense.

(c) The complaint shall be filed in the manner prescribed by the USPTO Director.

**§ 11.35 Service of complaint.**

(a) A complaint may be served on a respondent in any of the following methods:

(1) By delivering a copy of the complaint personally to the respondent, in which case the individual who gives the complaint to the respondent shall file an affidavit with the OED Director indicating the time and place the complaint was delivered to the respondent.

(2) By mailing a copy of the complaint by ''Express Mail,'' first-class mail, or any delivery service that provides ability to confirm delivery or attempted delivery to:

(i) A respondent who is a registered practitioner at the address provided to OED pursuant to § 11.11, or

(ii) A respondent who is a nonregistered practitioner at the last address for the respondent known to the OED Director.

(3) By any method mutually agreeable to the OED Director and the respondent.

(4) In the case of a respondent who resides outside the United States, by sending a copy of the complaint by any delivery service that provides ability to confirm delivery or attempted delivery, to:

(i) A respondent who is a registered practitioner at the address provided to OED pursuant to § 11.11; or

(ii) A respondent who is a nonregistered practitioner at the last address for the respondent known to the OED Director.

(b) If a copy of the complaint cannot be delivered to the respondent through any one of the procedures in paragraph (a) of this section, the OED Director shall serve the respondent by causing an appropriate notice to be published in

the Official Gazette for two consecutive weeks, in which case, the time for filing an answer shall be thirty days from the second publication of the notice. Failure to timely file an answer will constitute an admission of the allegations in the complaint in accordance with paragraph (d) of § 11.36, and the hearing officer may enter an initial decision on default.

(c) If the respondent is known to the OED Director to be represented by an attorney under § 11.40(a), a copy of the complaint shall be served on the attorney in lieu of service on the respondent in the manner provided for in paragraph (a) or (b) of this section.

**§ 11.36 Answer to complaint.**

(a) *Time for answer.* An answer to a complaint shall be filed within the time set in the complaint but in no event shall that time be less than thirty days from the date the complaint is filed.

(b) *With whom filed.* The answer shall be filed in writing with the hearing officer at the address specified in the complaint. The hearing officer may extend the time for filing an answer once for a period of no more than thirty days upon a showing of good cause, provided a motion requesting an extension of time is filed within thirty days after the date the complaint is served on respondent. A copy of the answer, and any exhibits or attachments thereto, shall be served on the OED Director.

(c) *Content.* The respondent shall include in the answer a statement of the facts that constitute the grounds of defense and shall specifically admit or deny each allegation set forth in the complaint. The respondent shall not deny a material allegation in the complaint that the respondent knows to be true or state that respondent is without sufficient information to form a belief as to the truth of an allegation, when in fact the respondent possesses that information. The respondent shall also state affirmatively in the answer special matters of defense and any intent to raise a disability as a mitigating factor. If respondent intends to raise a special matter of defense or disability, the answer shall specify the defense or disability, its nexus to the misconduct, and the reason it provides a defense or mitigation. A respondent who fails to do so cannot rely on a special matter of defense or disability. The hearing officer may, for good cause, allow the respondent to file the statement late, grant additional hearing preparation time, or make other appropriate orders.

(d) *Failure to deny allegations in complaint.* Every allegation in the complaint that is not denied by a respondent in the answer shall be deemed to be admitted and may be considered proven. The hearing officer at any hearing need receive no further evidence with respect to that allegation.

(e) *Default judgment.* Failure to timely file an answer will constitute an admission of the allegations in the complaint and may result in entry of default judgment.

**§ 11.37 [Reserved]**

**§ 11.38 Contested case.**

Upon the filing of an answer by the respondent, a disciplinary proceeding shall be regarded as a contested case within the meaning of 35 U.S.C. 24. Evidence obtained by a subpoena issued under 35 U.S.C. 24 shall not be admitted into the record or considered unless leave to proceed under 35 U.S.C. 24 was previously authorized by the hearing officer.

**§ 11.39 Hearing officer; appointment; responsibilities; review of interlocutory orders; stays.**

(a) *Appointment.* A hearing officer, appointed by the USPTO Director under 5 U.S.C. 3105 or 35 U.S.C. 32, shall conduct disciplinary proceedings as provided by this Part.

(b) *Independence of the Hearing Officer.* (1) A hearing officer appointed in accordance with paragraph (a) of this section shall not be subject to first level or second level supervision by either the USPTO Director or OED Director, or his or her designee.

(2) A hearing officer appointed in accordance with paragraph (a) of this section shall not be subject to supervision of the person(s) investigating or prosecuting the case.

(3) A hearing officer appointed in accordance with paragraph (a) of this section shall be impartial, shall not be an individual who has participated in any manner in the decision to initiate the proceedings, and shall not have been employed under the immediate supervision of the practitioner.

(4) A hearing officer appointed in accordance with paragraph (a) of this section shall be admitted to practice law and have suitable experience and training conducting hearings, reaching a determination, and rendering an initial decision in an equitable manner.

(c) *Responsibilities.* The hearing officer shall have authority, consistent with specific provisions of these regulations, to:

(1) Administer oaths and affirmations;

(2) Make rulings upon motions and other requests;

(3) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(4) Authorize the taking of a deposition of a witness in lieu of personal appearance of the witness before the hearing officer;

(5) Determine the time and place of any hearing and regulate its course and conduct;

(6) Hold or provide for the holding of conferences to settle or simplify the issues;

(7) Receive and consider oral or written arguments on facts or law;

(8) Adopt procedures and modify procedures for the orderly disposition of proceedings;

(9) Make initial decisions under §§ 11.25 and 11.54; and

(10) Perform acts and take measures as necessary to promote the efficient, timely, and impartial conduct of any disciplinary proceeding.

(d) *Time for making initial decision.* The hearing officer shall set times and exercise control over a disciplinary proceeding such that an initial decision under § 11.54 is normally issued within nine months of the date a complaint is filed. The hearing officer may, however, issue an initial decision more than nine months after a complaint is filed if there exist circumstances, in his or her opinion, that preclude issuance of an initial decision within nine months of the filing of the complaint.

(e) *Review of interlocutory orders.* The USPTO Director will not review an interlocutory order of a hearing officer except:

(1) When the hearing officer shall be of the opinion:

(i) That the interlocutory order involves a controlling question of procedure or law as to which there is a substantial ground for a difference of opinion, and

(ii) That an immediate decision by the USPTO Director may materially advance the ultimate termination of the disciplinary proceeding, or

(2) In an extraordinary situation where the USPTO Director deems that justice requires review.

(f) *Stays pending review of interlocutory order.* If the OED Director or a respondent seeks review of an interlocutory order of a hearing officer under paragraph (b)(2) of this section, any time period set by the hearing officer for taking action shall not be stayed unless ordered by the USPTO Director or the hearing officer.

(g) The hearing officer shall engage in no *ex parte* discussions with any party on the merits of the complaint, beginning with appointment and ending when the final agency decision is issued.

**§ 11.40 Representative for OED Director or respondent.**

(a) A respondent may represent himself or herself, or be represented by an attorney before the Office in connection with an investigation or disciplinary proceeding. The attorney shall file a written declaration that he or she is an attorney within the meaning of § 11.1 and shall state:

(1) The address to which the attorney wants correspondence related to the investigation or disciplinary proceeding sent, and

(2) A telephone number where the attorney may be reached during normal business hours.

(b) The Deputy General Counsel for Intellectual Property and Solicitor, and attorneys in the Office of the Solicitor shall represent the OED Director. The attorneys representing the OED Director in disciplinary proceedings shall not consult with the USPTO Director, the General Counsel, the Deputy General Counsel for General Law, or an individual designated by the USPTO Director to decide disciplinary matters regarding the proceeding. The General Counsel and the Deputy General Counsel for General Law shall remain screened from the investigation and prosecution of all disciplinary proceedings in order that they shall be available as counsel to the USPTO Director in deciding disciplinary proceedings unless access is appropriate to perform their duties. After a final decision is entered in a disciplinary proceeding, the OED Director and attorneys representing the OED Director shall be available to counsel the USPTO Director, the General Counsel, and the Deputy General Counsel for General Law in any further proceedings.

**§ 11.41 Filing of papers.**

(a) The provisions of §§ 1.8 and 2.197 of this subchapter do not apply to disciplinary proceedings. All papers filed after the complaint and prior to entry of an initial decision by the hearing officer shall be filed with the hearing officer at an address or place designated by the hearing officer.

(b) All papers filed after entry of an initial decision by the hearing officer shall be filed with the USPTO Director. A copy of the paper shall be served on the OED Director. The hearing officer or the OED Director may provide for filing papers and other matters by hand, by ''Express Mail,'' or by other means.

**§ 11.42 Service of papers.**

(a) All papers other than a complaint shall be served on a respondent who is represented by an attorney by:

(1) Delivering a copy of the paper to the office of the attorney; or

(2) Mailing a copy of the paper by first-class mail, ''Express Mail,'' or other delivery service to the attorney at the address provided by the attorney under § 11.40(a)(1); or

(3) Any other method mutually agreeable to the attorney and a representative for the OED Director.

(b) All papers other than a complaint shall be served on a respondent who is not represented by an attorney by:

(1) Delivering a copy of the paper to the respondent; or

(2) Mailing a copy of the paper by first-class mail, ''Express Mail,'' or other delivery service to the respondent at the address to which a complaint may be served or such other address as may be designated in writing by the respondent; or

(3) Any other method mutually agreeable to the respondent and a representative of the OED Director.

(c) A respondent shall serve on the representative for the OED Director one copy of each paper filed with the hearing officer or the OED Director. A paper may be served on the representative for the OED Director by:

(1) Delivering a copy of the paper to the representative; or

(2) Mailing a copy of the paper by first-class mail, ''Express Mail,'' or other delivery service to an address designated in writing by the representative; or

(3) Any other method mutually agreeable to the respondent and the representative.

(d) Each paper filed in a disciplinary proceeding shall contain therein a certificate of service indicating:

(1) The date on which service was made; and

(2) The method by which service was made.

(e) The hearing officer or the USPTO Director may require that a paper be served by hand or by ''Express Mail.''

(f) Service by mail is completed when the paper mailed in the United States is placed into the custody of the U.S. Postal Service.

**§ 11.43 Motions.**

Motions, including all prehearing motions commonly filed under the Federal Rules of Civil Procedure, shall be filed with the hearing officer. The hearing officer will determine whether replies to responses will be authorized and the time period for filing such a response. No motion shall be filed with the hearing officer unless such motion is supported by a written statement by the moving party that the moving party or attorney for the moving party has conferred with the opposing party or attorney for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach agreement. If, prior to a decision on the motion, the parties resolve issues raised by a motion presented to the hearing officer, the parties shall promptly notify the hearing officer.

**§ 11.44 Hearings.**

(a) The hearing officer shall preside over hearings in disciplinary proceedings. The hearing officer shall set the time and place for the hearing. In cases involving an incarcerated respondent, any necessary oral hearing may be held at the location of incarceration. Oral hearings will be stenographically recorded and transcribed, and the testimony of witnesses will be received under oath or affirmation. The hearing officer shall conduct the hearing as if the proceeding were subject to 5 U.S.C. 556. A copy of the transcript of the hearing shall become part of the record. A copy of the transcript shall be provided to the OED Director and the respondent at the expense of the Office.

(b) If the respondent to a disciplinary proceeding fails to appear at the hearing after a notice of hearing has been given by the hearing officer, the hearing officer may deem the respondent to have waived the right to a hearing and may proceed with the hearing in the absence of the respondent.

(c) A hearing under this section will not be open to the public except that the hearing officer may grant a request by a respondent to open his or her hearing to the public and make the record of the disciplinary proceeding available for public inspection, *provided,* a protective order is entered to exclude from public disclosure information which is privileged or confidential under applicable laws or regulations.

**§ 11.45 Amendment of pleadings.**

The OED Director may, without Committee on Discipline authorization, but with the authorization of the hearing officer, amend the complaint to include additional charges based upon conduct committed before or after the complaint was filed. If amendment of the complaint is authorized, the hearing officer shall authorize amendment of the answer. Any party who would otherwise be prejudiced by the amendment will be given reasonable opportunity to meet the allegations in the complaint or answer as amended, and the hearing officer shall make findings on any issue presented by the complaint or answer as amended.

**§§ 11.46–11.48 [Reserved]**

**§ 11.49 Burden of proof.**

In a disciplinary proceeding, the OED Director shall have the burden of proving the violation by clear and convincing evidence and a respondent shall have the burden of proving any affirmative defense by clear and convincing evidence.

**§ 11.50 Evidence.**

(a) *Rules of evidence.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings in disciplinary proceedings. However, the hearing officer shall exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* Depositions of witnesses taken pursuant to § 11.51 may be admitted as evidence.

(c) *Government documents.* Official documents, records, and papers of the Office, including, but not limited to, all papers in the file of a disciplinary investigation, are admissible without extrinsic evidence of authenticity. These documents, records, and papers may be evidenced by a copy certified as correct by an employee of the Office.

(d) *Exhibits.* If any document, record, or other paper is introduced in evidence as an exhibit, the hearing officer may authorize the withdrawal of the exhibit subject to any conditions the hearing officer deems appropriate.

(e) *Objections.* Objections to evidence will be in short form, stating the grounds of objection. Objections and rulings on objections will be a part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

**§ 11.51 Depositions.**

(a) Depositions for use at the hearing in lieu of personal appearance of a witness before the hearing officer may be taken by respondent or the OED Director upon a showing of good cause and with the approval of, and under such conditions as may be deemed appropriate by, the hearing officer. Depositions may be taken upon oral or written questions, upon not less than ten days' written notice to the other party, before any officer authorized to administer an oath or affirmation in the place where the deposition is to be taken. The parties may waive the requirement of ten days' notice and depositions may then be taken of a witness at a time and place mutually agreed to by the parties. When a deposition is taken upon written questions, copies of the written questions will be served upon the other party with the notice, and copies of any written cross-questions will be served by hand or ''Express Mail'' not less than five days before the date of the taking of the deposition unless the parties mutually agree otherwise. A party on whose behalf a deposition is taken shall file a copy of a transcript of the deposition signed by a court reporter with the hearing officer and shall serve one copy upon the opposing party. Expenses for a court reporter and preparing, serving, and filing depositions shall be borne by the party at whose instance the deposition is taken. Depositions may not be taken to obtain discovery, except as provided for in paragraph (b) of this section.

(b) When the OED Director and the respondent agree in writing, a deposition of any witness who will appear voluntarily may be taken under such terms and conditions as may be mutually agreeable to the OED Director and the respondent. The deposition shall not be filed with the hearing officer and may not be admitted in evidence before the hearing officer unless he or she orders the deposition admitted in evidence. The admissibility of the deposition shall lie within the discretion of the hearing officer who may reject the deposition on any reasonable basis including the fact that demeanor is involved and that the witness should have been called to appear personally before the hearing officer.

**§ 11.52 Discovery.**

Discovery shall not be authorized except as follows:

(a) After an answer is filed under § 11.36 and when a party establishes that discovery is reasonable and relevant, the hearing officer, under such conditions as he or she deems appropriate, may order an opposing party to:

(1) Answer a reasonable number of written requests for admission or interrogatories;

(2) Produce for inspection and copying a reasonable number of documents; and

(3) Produce for inspection a reasonable number of things other than documents.

(b) Discovery shall not be authorized under paragraph (a) of this section of any matter which:

(1) Will be used by another party solely for impeachment;

(2) Is not available to the party under 35 U.S.C. 122;

(3) Relates to any other disciplinary proceeding;

(4) Relates to experts except as the hearing officer may require under paragraph (e) of this section;

(5) Is privileged; or

(6) Relates to mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party.

(c) The hearing officer may deny discovery requested under paragraph (a) of this section if the discovery sought:

(1) Will unduly delay the disciplinary proceeding;

(2) Will place an undue burden on the party required to produce the discovery sought; or

(3) Consists of information that is available:

(i) Generally to the public;

(ii) Equally to the parties; or

(iii) To the party seeking the discovery through another source.

(d) Prior to authorizing discovery under paragraph (a) of this section, the hearing officer shall require the party seeking discovery to file a motion (§ 11.43) and explain in detail, for each request made, how the discovery sought is reasonable and relevant to an issue actually raised in the complaint or the answer.

(e) The hearing officer may require parties to file and serve, prior to any hearing, a pre-hearing statement that contains:

(1) A list (together with a copy) of all proposed exhibits to be used in connection with a party's case-in-chief;

(2) A list of proposed witnesses;

(3) As to each proposed expert witness:

(i) An identification of the field in which the individual will be qualified as an expert;

(ii) A statement as to the subject matter on which the expert is expected to testify; and

(iii) A statement of the substance of the facts and opinions to which the expert is expected to testify;

(4) Copies of memoranda reflecting respondent's own statements to administrative representatives.

**§ 11.53 Proposed findings and conclusions; post-hearing memorandum.**

Except in cases in which the respondent has failed to answer the complaint or amended complaint, the hearing officer, prior to making an initial decision, shall afford the parties a reasonable opportunity to submit proposed findings and conclusions and a post-hearing memorandum in support of the proposed findings and conclusions.

**§ 11.54 Initial decision of hearing officer.**

(a) The hearing officer shall make an initial decision in the case. The decision will include:

(1) A statement of findings of fact and conclusions of law, as well as the

reasons or bases for those findings and conclusions with appropriate references to the record, upon all the material issues of fact, law, or discretion presented on the record, and

(2) An order of default judgment, of suspension or exclusion from practice, of reprimand, or an order dismissing the complaint. The hearing officer shall transmit a copy of the decision to the OED Director and to the respondent. After issuing the decision, the hearing officer shall transmit the entire record to the OED Director. In the absence of an appeal to the USPTO Director, the decision of the hearing officer, including a default judgment, will, without further proceedings, become the decision of the USPTO Director thirty days from the date of the decision of the hearing officer.

(b) The initial decision of the hearing officer shall explain the reason for any default judgment, reprimand, suspension, or exclusion. In determining any sanction, the following four factors must be considered if they are applicable:

(1) Whether the practitioner has violated a duty owed to a client, to the public, to the legal system, or to the profession;

(2) Whether the practitioner acted intentionally, knowingly, or negligently;

(3) The amount of the actual or potential injury caused by the practitioner's misconduct; and

(4) The existence of any aggravating or mitigating factors.

**§ 11.55 Appeal to the USPTO Director.**

(a) Within thirty days after the date of the initial decision of the hearing officer under §§ 11.25 or 11.54, either party may appeal to the USPTO Director. The appeal shall include the appellant's brief. If more than one appeal is filed, the party who files the appeal first is the appellant for purpose of this rule. If appeals are filed on the same day, the respondent is the appellant. If an appeal is filed, then the OED Director shall transmit the entire record to the USPTO Director. Any cross-appeal shall be filed within fourteen days after the date of service of the appeal pursuant to § 11.42, or thirty days after the date of the initial decision of the hearing officer, whichever is later. The cross-appeal shall include the cross-appellant's brief. Any appellee or cross-appellee brief must be filed within thirty days after the date of service pursuant to § 11.42 of an appeal or cross-appeal. Any reply brief must be filed within fourteen days after the date of service of any appellee or cross-appellee brief.

(b) An appeal or cross-appeal must include exceptions to the decisions of the hearing officer and supporting reasons for those exceptions. Any exception not raised will be deemed to have been waived and will be disregarded by the USPTO Director in reviewing the initial decision.

(c) All briefs shall:

(1) Be filed with the USPTO Director at the address set forth in § 1.1(a)(3)(ii) of this subchapter and served on the opposing party;

(2) Include separate sections containing a concise statement of the disputed facts and disputed points of law; and

(3) Be typed on 8½ by 11-inch paper, and comply with Rule 32(a)(4)–(6) of the Federal Rules of Appellate Procedure.

(d) An appellant's, cross-appellant's, appellee's, and cross-appellee's brief shall be no more than thirty pages in length, and comply with Rule 28(a)(2), (3), and (5) through (10) of the Federal Rules of Appellate Procedure. Any reply brief shall be no more than fifteen pages in length, and shall comply with Rule 28(a)(2), (3), (8), and (9) of the Federal Rules of Appellate Procedure.

(e) The USPTO Director may refuse entry of a nonconforming brief.

(f) The USPTO Director will decide the appeal on the record made before the hearing officer.

(g) Unless the USPTO Director permits, no further briefs or motions shall be filed.

(h) The USPTO Director may order reopening of a disciplinary proceeding in accordance with the principles that govern the granting of new trials. Any request to reopen a disciplinary proceeding on the basis of newly discovered evidence must demonstrate that the newly discovered evidence could not have been discovered by due diligence.

(i) In the absence of an appeal by the OED Director, failure by the respondent to appeal under the provisions of this section shall result in the initial decision being final and effective thirty days from the date of the initial decision of the hearing officer.

**§ 11.56 Decision of the USPTO Director.**

(a) The USPTO Director shall decide an appeal from an initial decision of the hearing officer. On appeal from the initial decision, the USPTO Director has authority to conduct a de novo review of the factual record. The USPTO Director may affirm, reverse, or modify the initial decision or remand the matter to the hearing officer for such further proceedings as the USPTO Director may deem appropriate. In making a final decision, the USPTO Director shall review the record or the portions of the record designated by the parties. The USPTO Director shall transmit a copy of the final decision to the OED Director and to the respondent.

(b) A final decision of the USPTO Director may dismiss a disciplinary proceeding, reverse or modify the initial decision, reprimand a practitioner, or may suspend or exclude the practitioner from practice before the Office. A final decision suspending or excluding a practitioner shall require compliance with the provisions of § 11.58. The final decision may also condition the reinstatement of the practitioner upon a showing that the practitioner has taken steps to correct or mitigate the matter forming the basis of the action, or to prevent recurrence of the same or similar conduct.

(c) The respondent or the OED Director may make a single request for reconsideration or modification of the decision by the USPTO Director if filed within twenty days from the date of entry of the decision. No request for reconsideration or modification shall be granted unless the request is based on newly discovered evidence or error of law or fact, and the requestor must demonstrate that any newly discovered evidence could not have been discovered any earlier by due diligence. Such a request shall have the effect of staying the effective date of the order of discipline in the final decision. The decision by the USPTO Director is effective on its date of entry.

**§ 11.57 Review of final decision of the USPTO Director.**

(a) Review of the final decision by the USPTO Director in a disciplinary case may be had, subject to § 11.55(d), by a petition filed in accordance with 35 U.S.C. 32. The Respondent must serve the USPTO Director with the petition. Respondent must serve the petition in accordance with Rule 4 of the Federal Rules of Civil Procedure and § 104.2 of this Title.

(b) Except as provided for in § 11.56(c), an order for discipline in a final decision will not be stayed except on proof of exceptional circumstances.

**§ 11.58 Duties of disciplined or resigned practitioner, or practitioner on disability inactive status.**

(a) An excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status shall not engage in any practice of patent, trademark and other non-patent law before the Office. An excluded, suspended or resigned practitioner will not be automatically reinstated at the end of his or her period of exclusion or

suspension. An excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status must comply with the provisions of this section and § 11.60 to be reinstated. Failure to comply with the provisions of this section may constitute both grounds for denying reinstatement or readmission; and cause for further action, including seeking further exclusion, suspension, and for revocation of any pending probation.

(b) Unless otherwise ordered by the USPTO Director, any excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status shall:

(1) Within thirty days after the date of entry of the order of exclusion, suspension, acceptance of resignation, or transfer to disability inactive status:

(i) File a notice of withdrawal as of the effective date of the exclusion, suspension, acceptance of resignation, or transfer to disability inactive status in each pending patent and trademark application, each pending reexamination and interference proceeding, and every other matter pending in the Office, together with a copy of the notices sent pursuant to paragraphs (b) and (c) of this section;

(ii) Provide notice to all State and Federal jurisdictions and administrative agencies to which the practitioner is admitted to practice and all clients the practitioner represents having immediate or prospective business before the Office in patent, trademark and other non-patent matters of the order of exclusion, suspension, acceptance of resignation, or transferred to disability inactive status and of the practitioner's consequent inability to act as a practitioner after the effective date of the order; and that, if not represented by another practitioner, the client should act promptly to substitute another practitioner, or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

(iii) Provide notice to the practitioner(s) for all opposing parties (or, to the parties in the absence of a practitioner representing the parties) in matters pending before the Office of the practitioner's exclusion, suspension, resignation, or transfer to disability inactive status and, that as a consequence, the practitioner is disqualified from acting as a practitioner regarding matters before the Office after the effective date of the suspension, exclusion, resignation or transfer to disability inactive status, and state in the notice the mailing address of each client of the excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status who is a party in the pending matter;

(iv) Deliver to all clients having immediate or prospective business before the Office in patent, trademark or other non-patent matters any papers or other property to which the clients are entitled, or shall notify the clients and any co-practitioner of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(v) Relinquish to the client, or other practitioner designated by the client, all funds for practice before the Office, including any legal fees paid in advance that have not been earned and any advanced costs not expended;

(vi) Take any necessary and appropriate steps to remove from any telephone, legal, or other directory any advertisement, statement, or representation which would reasonably suggest that the practitioner is authorized to practice patent, trademark, or other non-patent law before the Office; and

(vii) Serve all notices required by paragraphs (b)(1)(ii) and (b)(1)(iii) of this section by certified mail, return receipt requested, unless mailed abroad. If mailed abroad, all notices shall be served with a receipt to be signed and returned to the practitioner.

(2) Within forty-five days after entry of the order of suspension, exclusion, or of acceptance of resignation, the practitioner shall file with the OED Director an affidavit of compliance certifying that the practitioner has fully complied with the provisions of the order, this section, and with the Mandatory Disciplinary Rules identified in § 10.20(b) of this subchapter for withdrawal from representation. Appended to the affidavit of compliance shall be:

(i) A copy of each form of notice, the names and addresses of the clients, practitioners, courts, and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise ordered by the USPTO Director;

(ii) A schedule showing the location, title and account number of every bank account designated as a client or trust account, deposit account in the Office, or other fiduciary account, and of every account in which the practitioner holds or held as of the entry date of the order any client, trust, or fiduciary funds for practice before the Office;

(iii) A schedule describing the practitioner's disposition of all client and fiduciary funds for practice before the Office in the practitioner's possession, custody or control as of the date of the order or thereafter;

(iv) Such proof of the proper distribution of said funds and the closing of such accounts as has been requested by the OED Director, including copies of checks and other instruments;

(v) A list of all other State, Federal, and administrative jurisdictions to which the practitioner is admitted to practice; and

(vi) An affidavit describing the precise nature of the steps taken to remove from any telephone, legal, or other directory any advertisement, statement, or representation which would reasonably suggest that the practitioner is authorized to practice patent, trademark, or other non-patent law before the Office. The affidavit shall also state the residence or other address of the practitioner to which communications may thereafter be directed, and list all State and Federal jurisdictions, and administrative agencies to which the practitioner is admitted to practice. The OED Director may require such additional proof as is deemed necessary. In addition, for the period of discipline, an excluded or suspended practitioner, or a practitioner transferred to disability inactive status shall continue to file a statement in accordance with § 11.11, regarding any change of residence or other address to which communications may thereafter be directed, so that the excluded or suspended practitioner, or practitioner transferred to disability inactive status may be located if a grievance is received regarding any conduct occurring before or after the exclusion or suspension. The practitioner shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice requirements.

(3) Not hold himself or herself out as authorized to practice law before the Office.

(4) Not advertise the practitioner's availability or ability to perform or render legal services for any person having immediate or prospective business before the Office as to that business.

(5) Not render legal advice or services to any person having immediate or prospective business before the Office as to that business.

(6) Promptly take steps to change any sign identifying the practitioner's or the practitioner's firm's office and the practitioner's or the practitioner's firm's stationery to delete therefrom any

advertisement, statement, or representation which would reasonably suggest that the practitioner is authorized to practice law before the Office.

(c) An excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status after entry of the order of exclusion or suspension, acceptance of resignation, or transfer to disability inactive status shall not accept any new retainer regarding immediate or prospective business before the Office, or engage as a practitioner for another in any new case or legal matter regarding practice before the Office. The excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status shall be granted limited recognition for a period of thirty days. During the thirty-day period of limited recognition, the excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status shall conclude work on behalf of a client on any matters that were pending before the Office on the date of entry of the order of exclusion or suspension, or acceptance of resignation. If such work cannot be concluded, the excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status shall so advise the client so that the client may make other arrangements.

(d) *Required records.* An excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status shall keep and maintain records of the various steps taken under this section, so that in any subsequent proceeding proof of compliance with this section and with the exclusion or suspension order will be available. The OED Director will require the practitioner to submit such proof as a condition precedent to the granting of any petition for reinstatement.

(e) An excluded, suspended or resigned practitioner, or practitioner on disability inactive status who aids another practitioner in any way in the other practitioner's practice of law before the Office, may, under the direct supervision of the other practitioner, act as a paralegal for the other practitioner or perform other services for the other practitioner which are normally performed by laypersons, provided:

(1) The excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status is a salaried employee of:

(i) The other practitioner;

(ii) The other practitioner's law firm; or

(iii) A client-employer who employs the other practitioner as a salaried employee;

(2) The other practitioner assumes full professional responsibility to any client and the Office for any work performed by the excluded, suspended or resigned practitioner for the other practitioner;

(3) The excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status does not:

(i) Communicate directly in writing, orally, or otherwise with a client of the other practitioner in regard to any immediate or prospective business before the Office;

(ii) Render any legal advice or any legal services to a client of the other practitioner in regard to any immediate or prospective business before the Office; or

(iii) Meet in person or in the presence of the other practitioner in regard to any immediate or prospective business before the Office, with:

(A) Any Office employee in connection with the prosecution of any patent, trademark, or other case;

(B) Any client of the other practitioner, the other practitioner's law firm, or the client-employer of the other practitioner; or

(C) Any witness or potential witness whom the other practitioner, the other practitioner's law firm, or the other practitioner's client-employer may or intends to call as a witness in any proceeding before the Office. The term ''witness'' includes individuals who will testify orally in a proceeding before, or sign an affidavit or any other document to be filed in, the Office.

(f) When an excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status acts as a paralegal or performs services under paragraph (e) of this section, the practitioner shall not thereafter be reinstated to practice before the Office unless:

(1) The practitioner shall have filed with the OED Director an affidavit which:

(i) Explains in detail the precise nature of all paralegal or other services performed by the excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status, and

(ii) Shows by clear and convincing evidence that the excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status has complied with the provisions of this section and all Mandatory Disciplinary Rules identified in § 10.20(b) of this subchapter; and

(2) The other practitioner shall have filed with the OED Director a written statement which:

(i) Shows that the other practitioner has read the affidavit required by paragraph (d)(1) of this section and that the other practitioner believes every statement in the affidavit to be true, and

(ii) States why the other practitioner believes that the excluded, suspended or resigned practitioner, or practitioner transferred to disability inactive status has complied with paragraph (c) of this section.

**§ 11.59 Dissemination of disciplinary and other information.**

(a) The OED Director shall inform the public of the disposition of each matter in which public discipline has been imposed, and of any other changes in a practitioner's registration status. Public discipline includes exclusion, as well as exclusion on consent; suspension; and public reprimand. Unless otherwise ordered by the USPTO Director, the OED Director shall give notice of public discipline and the reasons for the discipline to disciplinary enforcement agencies in the State where the practitioner is admitted to practice, to courts where the practitioner is known to be admitted, and the public. If public discipline is imposed, the OED Director shall cause a final decision of the USPTO Director to be published. Final decisions of the USPTO Director include default judgments. See § 11.54(a)(2). If a private reprimand is imposed, the OED Director shall cause a redacted version of the final decision to be published.

(b) *Records available to the public.* Unless the USPTO Director orders that the proceeding or a portion of the record be kept confidential, the OED Director's records of every disciplinary proceeding where a practitioner is reprimanded, suspended, or excluded, including when said sanction is imposed by default judgment, shall be made available to the public upon written request, except that information may be withheld as necessary to protect the privacy of third parties or as directed in a protective order issued pursuant to § 11.44(c). The record of a proceeding that results in a practitioner's transfer to disability inactive status shall not be available to the public.

(c) *Access to records of exclusion by consent.* Unless the USPTO Director orders that the proceeding or a portion of the record be kept confidential, an order excluding a practitioner on consent under § 11.27 and the affidavit required under paragraph (a) of § 11.27 shall be available to the public, except that information in the order or affidavit

may be withheld as necessary to protect the privacy of third parties or as directed in a protective order under § 11.44(c). The affidavit required under paragraph (a) of § 11.27 shall not be used in any other proceeding except by order of the USPTO Director or upon written consent of the practitioner.

**§ 11.60 Petition for reinstatement.**

(a) *Restrictions on reinstatement.* An excluded, suspended or resigned practitioner shall not resume practice of patent, trademark, or other non-patent law before the Office until reinstated by order of the OED Director or the USPTO Director.

(b) *Petition for reinstatement.* An excluded or suspended practitioner shall be eligible to apply for reinstatement only upon expiration of the period of suspension or exclusion and the practitioner's full compliance with § 11.58. An excluded practitioner shall be eligible to apply for reinstatement no earlier than at least five years from the effective date of the exclusion. A resigned practitioner shall be eligible to petition for reinstatement and must show compliance with § 11.58 no earlier than at least five years from the date the practitioner's resignation is accepted and an order is entered excluding the practitioner on consent.

(c) *Review of reinstatement petition.* An excluded, suspended or resigned practitioner shall file a petition for reinstatement accompanied by the fee required by § 1.21(a)(10) of this subchapter. The petition for reinstatement shall be filed with the OED Director. An excluded or suspended practitioner who has violated any provision of § 11.58 shall not be eligible for reinstatement until a continuous period of the time in compliance with § 11.58 that is equal to the period of suspension or exclusion has elapsed. A resigned practitioner shall not be eligible for reinstatement until compliance with § 11.58 is shown. If the excluded, suspended or resigned practitioner is not eligible for reinstatement, or if the OED Director determines that the petition is insufficient or defective on its face, the OED Director may dismiss the petition. Otherwise the OED Director shall consider the petition for reinstatement. The excluded, suspended or resigned practitioner seeking reinstatement shall have the burden of proof by clear and convincing evidence. Such proof shall be included in or accompany the petition, and shall establish:

(1) That the excluded, suspended or resigned practitioner has the good moral character and reputation, competency, and learning in law required under § 11.7 for admission;

(2) That the resumption of practice before the Office will not be detrimental to the administration of justice or subversive to the public interest; and

(3) That the suspended practitioner has complied with the provisions of § 11.58 for the full period of suspension, that the excluded practitioner has complied with the provisions of § 11.58 for at least five continuous years, or that the resigned practitioner has complied with § 11.58 upon acceptance of the resignation.

(d) *Petitions for reinstatement—Action by the OED Director granting reinstatement.* (1) If the excluded, suspended or resigned practitioner is found to have complied with paragraphs (c)(1) through (c)(3) of this section, the OED Director shall enter an order of reinstatement, which shall be conditioned on payment of the costs of the disciplinary proceeding to the extent set forth in paragraphs (d)(2) and (3) of this section.

(2) *Payment of costs of disciplinary proceedings.* Prior to reinstatement to practice, the excluded or suspended practitioner shall pay the costs of the disciplinary proceeding. The costs imposed pursuant to this section include all of the following:

(i) The actual expense incurred by the OED Director or the Office for the original and copies of any reporter's transcripts of the disciplinary proceeding, and any fee paid for the services of the reporter;

(ii) All expenses paid by the OED Director or the Office which would qualify as taxable costs recoverable in civil proceedings; and

(iii) The charges determined by the OED Director to be ''reasonable costs'' of investigation, hearing, and review. These amounts shall serve to defray the costs, other than fees for services of attorneys and experts, of the Office of Enrollment and Discipline in the preparation or hearing of the disciplinary proceeding, and costs incurred in the administrative processing of the disciplinary proceeding.

(3) An excluded or suspended practitioner may be granted relief, in whole or in part, only from an order assessing costs under this section or may be granted an extension of time to pay these costs, in the discretion of the OED Director, upon grounds of hardship, special circumstances, or other good cause.

(e) *Petitions for reinstatement—Action by the OED Director denying reinstatement.* If the excluded, suspended or resigned practitioner is found unfit to resume the practice of patent law before the Office, the OED Director shall first provide the excluded, suspended or resigned practitioner with an opportunity to show cause in writing why the petition should not be denied. Failure to comply with § 11.12(c) shall constitute unfitness. If unpersuaded by the showing, the OED Director shall deny the petition. The OED Director may require the excluded, suspended or resigned practitioner, in meeting the requirements of § 11.7, to take and pass an examination under § 11.7(b), ethics courses, and/or the Multistate Professional Responsibility Examination. The OED Director shall provide findings, together with the record. The findings shall include on the first page, immediately beneath the caption of the case, a separate section entitled ''Prior Proceedings'' which shall state the docket number of the original disciplinary proceeding in which the exclusion or suspension was ordered.

(f) *Resubmission of petitions for reinstatement.* If a petition for reinstatement is denied, no further petition for reinstatement may be filed until the expiration of at least one year following the denial unless the order of denial provides otherwise.

(g) *Reinstatement proceedings open to public.* Proceedings on any petition for reinstatement shall be open to the public. Before reinstating any excluded or suspended practitioner, the OED Director shall publish a notice of the excluded or suspended practitioner's petition for reinstatement and shall permit the public a reasonable opportunity to comment or submit evidence with respect to the petition for reinstatement.

**§ 11.61 Savings clause.**

(a) A disciplinary proceeding based on conduct engaged in prior to September 15, 2008 may be instituted subsequent to such effective date, if such conduct would continue to justify suspension or exclusion under the provisions of this part.

(b) No practitioner shall be subject to a disciplinary proceeding under this part based on conduct engaged in before the effective date hereof if such conduct would not have been subject to disciplinary action before September 15, 2008.

(c) Sections 11.24, 11.25, 11.28 and 11.34 through 11.57 shall apply to all proceedings in which the complaint is filed on or after the effective date of these regulations. Section 11.26 and 11.27 shall apply to matters pending on or after September 15, 2008.

(d) Sections 11.58 through 11.60 shall apply to all cases in which an order of suspension or exclusion is entered or resignation is accepted on or after September 15, 2008.

**§§ 11.62–11.99 [Reserved]**

## PART 41—PRACTICE BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

■ 43. The authority citation for 37 CFR part 41 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2), 3(a)(2)(A), 21, 23, 32, 41, 134, 135.

■ 44. Revise § 41.5(e) to read as follows:

**§ 41.5 Counsel.**

* * * * *

(e) *Referral to the Director of Enrollment and Discipline.* Possible violations of the disciplinary rules in part 11 of this subchapter may be referred to the Office of Enrollment and Discipline for investigation. See § 11.22 of this subchapter.

Date: July 31, 2008.

**Jon W. Dudas,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. E8–18109 Filed 8–13–08; 8:45 am]

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Federal Register

Thursday,
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# Part III

# Department of the Interior

## Fish and Wildlife Service

**50 CFR Part 17**

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Poa atropurpurea* (San Bernardino bluegrass) and *Taraxacum californicum* (California taraxacum); Final Rule**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[FWS–R8–ES–2007–0010; 92210–1117–0000–B4]**

**RIN 1018–AV04**

## Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Poa atropurpurea* (San Bernardino bluegrass) and *Taraxacum californicum* (California taraxacum)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for *Poa atropurpurea* and *Taraxacum californicum* under the Endangered Species Act of 1973, as amended (Act). Approximately 2,489 acres (ac) (1,009 hectares (ha)) of land in San Bernardino and San Diego Counties, California, fall within the boundaries of the critical habitat designation for *P. atropurpurea*, and approximately 1,914 ac (775 ha) of land in San Bernardino County, California, fall within the boundaries of the critical habitat designation for *T. californicum*.

**DATES:** This rule becomes effective on September 15, 2008.

**ADDRESSES:** The final rule, final economic analysis, and map of critical habitat will be available on the Internet at *http://www.regulations.gov*. Supporting documentation we used in preparing this final rule, will be available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Background

It is our intent to discuss only those topics directly relevant to the designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* in this final rule. For more information on the taxonomy, biology, and ecology of *P. atropurpurea* and *T. californicum,* refer to the final listing rule published in the **Federal Register** on September 14, 1998 (63 FR 49006), the proposed critical habitat rule published in the **Federal Register** on August 7, 2007 (72 FR 44232), and the notice of availability (NOA) of the draft economic analysis (EA) published in the **Federal Register** on April 16, 2008 (73 FR 20600).

### Previous Federal Actions

As discussed in the proposed rule (72 FR 44232, August 7, 2007), the Service agreed, as part of an April 20, 2007, settlement agreement, to submit to the **Federal Register** a proposed rule to designate critical habitat, if prudent, on or before July 27, 2007, and a final rule by July 25, 2008. The proposed critical habitat designations for *Poa atropurpurea* and *Taraxacum californicum* were signed on July 25, 2007 and published in the **Federal Register** on August 7, 2007 (72 FR 44232). We also published a reopening of the public comment period and notice of public hearings, which were held in San Bernardino, California on January 10, 2008, on December 11, 2007 (72 FR 70284), and we published a NOA of the draft EA (dated April 9, 2008) of the proposed rule on April 16, 2008 (73 FR 20600).

For a discussion of additional Federal actions that occurred prior to the proposed designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum*, please refer to the ''Previous Federal Actions'' section of the proposed critical habitat rule (72 FR 44232, August 7, 2007) and the final listing rule (63 FR 49006, September 14, 1998).

### Summary of Comments and Recommendations

We requested written comments from the public on the proposed designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* during three comment periods. The first comment period, associated with the publication of the proposed rule for these two species, opened August 7, 2007, and closed October 9, 2007 (72 FR 44232). We received two requests for a public hearing during this comment period. The second comment period associated with the publication of a notice of public hearings, which were held in San Bernardino, California on January 10, 2008, opened December 11, 2007, and closed to January 25, 2008 (72 FR 70284). The third comment period, associated with the publication of the notice of availability of the draft EA (dated April 9, 2008) of the proposed designations, opened April 16, 2008, and closed May 16, 2008 (73 FR 20600). During these three public comment periods, we contacted appropriate Tribal governments; Federal, State, and local agencies and jurisdictions; scientific organizations; and other interested parties and invited them to comment on the proposed critical habitat designations for these two species and the associated draft EA.

During the first comment period, we received seven comments directly addressing the proposed critical habitat designations: one from a Federal agency; three from peer reviewers; and three from individual members of the public. During the second comment period and the January 10, 2008, public hearings, we received eight comments directly addressing the proposed critical habitat designations: five from local governments, two from organizations, and one from an individual member of the public. During the third comment period, we received four comments directly addressing the proposed critical habitat designations: one from a Federal agency, one from a Tribal government, one from a local government, and one from an individual member of the public. We received two comments directly addressing the draft EA, including one from a Federal agency and one from an individual member of the public.

*Peer Review*

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region where the species occurs, and conservation biology principles. As noted above, we received responses from three of the peer reviewers.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for *Poa atropurpurea* and *Taraxacum californicum*. All comments received were grouped into general issue categories relating to the proposed critical habitat rule and draft EA for *P. atropurpurea* and *T. californicum* and are addressed in the following summary and incorporated into this final rule as appropriate.

*Peer Reviewer Comments*

*Comment 1*: The peer reviewers' comments were generally supportive of the proposed designations of critical habitat. The peer reviewers provided specific comments on each unit of

critical habitat. One peer reviewer provided comments primarily on *Poa atropurpurea*, one peer reviewer provided comments primarily on *Taraxacum californicum*, and the third peer reviewer provided comments on both species. Unit 3, Belleville Meadow, was cited as the most important site for *P. atropurpurea* by one peer reviewer and as the site containing the most vigorous population of *T. californicum* by another. Two commenters stressed the importance of understanding the threat caused to *T. californicum* by hybridization with the nonnative *T. officinale* and urged the development of a plan to remove *T. officinale* and hybrids from meadows where the two species co-occur. One peer reviewer indicated that the Service should investigate the viability and fitness of hybrid offspring as well as their breeding system so that appropriate management could be developed. Another peer reviewer stated that even when habitat for *T. californicum* is fenced or otherwise protected from disturbances, there would be a perpetual need to remove nonnative plants to protect *T. californicum* to provide for its recovery.

*Our Response*: The peer reviewers confirmed the importance of the areas that we identified as containing features essential to the conservation of each species and consequently delineated as critical habitat. Additionally, we added details about special management needs provided by the peer reviewers on topics such as hybridization in the ''Special Management Considerations or Protection'' section and the ''Final Critical Habitat Designations'' section of this rule.

*Comment 2*: Two peer reviewers provided comments on the size of the critical habitat units. One peer reviewer indicated we should consider using a buffer distance between 328 ft (100 m) and 3,280 ft (1,000 m) around known populations to delineate critical habitat. The peer reviewer stated that use of a buffer around the known populations would help protect the habitat of these two species and provide for their life history functions. The peer reviewer indicated that a larger buffer would: (1) Allow room for populations of these two plants to expand; (2) incorporate areas in which pollination and gene transfer could occur; and (3) allow a larger area in which the species could be protected from nonnative species by limiting nearby disturbance of habitat. Another peer reviewer stated that the extent of habitat included in critical habitat for Units 4 and 5 for *Poa atropurpurea* seemed too large when considering the population sizes reported for these units.

*Our Response*: We believe that we captured in the proposed rule the appropriate extent of habitat in the units to be designated as critical habitat. Each critical habitat unit designated contains the physical and biological features essential to the conservation of each species and supports the primary constituent elements (PCEs) for these two species, including the known populations, montane meadow habitat, and the hydrologic features within montane meadows. The hydrologic features create the wet or mesic conditions that support these two species. As discussed in the ''Criteria Used to Identify Critical Habitat'' section, we delineated proposed critical habitat for *Poa atropurpurea* and *Taraxacum californicum* using the following criteria: (1) Areas occupied by individuals at the time of listing and areas currently occupied by these species; (2) areas containing one or more of the PCEs for these species (for example, montane meadow habitat); and (3) areas currently occupied by more than 10 individuals of either species. To capture the physical and biological features essential to the conservation of each species, we included meadow habitat within 328 ft (100 m) of known occurrences, and in most cases the entire montane meadow associated with designated occurrences. However, the mapping process we used does not include non-meadow habitat, such as Great Basin sage scrub or Jeffrey pine forest vegetation communities. We believe our criteria capture the physical and biological features essential to the conservation of *P. atropurpurea* and *T. californicum* and appropriately identify the areas that meet the definition of critical habitat. The peer reviewer suggested that designating additional land as buffers would allow for population expansion, pollination and gene flow, and management for nonnative species. However, we determined that our designation of the areas containing the physical and biological features fulfills these biological needs and is adequate to conserve these species (for a more detailed discussion see the ''Criteria Used To Identify Critical Habitat'' section).

In response to the peer review comment that some areas appear large in relationship to the size of the population, please refer to the ''Criteria Used To Identify Critical Habitat'' section of the rule for the explanation of how we identified those areas that contain the physical and biological features essential to the conservation of *Poa atropurpurea* and *Taraxacum californicum* within the geographical area occupied by the species at the time of listing (which includes the wet meadow habitat that supports the populations). Applying the criterion to delineate the wet meadow habitat using the USFS-modeled potential habitat specific to each species (Volgarino *et al.* 2000a, pp. 1–2; 2000b, pp. 1–2) and aerial or satellite imagery resulted in differing sizes of critical habitat units based on the extent of wet meadow habitat in each unit.

*Comment 3*: One peer reviewer stated that he visited Unit 1, Pan Springs Meadow, several times since 1985 and observed dozens of *Taraxacum californicum* plants during some years. While the peer reviewer indicated that he had not extensively surveyed the area, he believes there are between 15 and 20 *T. californicum* plants in the area (Krantz 2008a, p. 1). The peer reviewer indicated that this unit has biogeographical significance to *T. californicum* because it represents one of the three largest remaining sites at the northeast end of Big Bear Valley. Within the northeast portion of Big Bear Valley are occurrences at Pan Hot Springs Meadow, Arrastre Flats, and North Baldwin Lake. The peer reviewer stated that the Arrastre Flats occurrence has not been observed for a number of years, despite several recent surveys in the area, and that the North Baldwin Lake occurrence has diminished to about 15 individuals. For these reasons, the reviewer believes we should designate Unit 1, Pan Hot Springs Meadow, as critical habitat *for T. californicum* as well as for *Poa atropurpurea*.

*Our Response*: We acknowledged in the proposed rule that the Pan Hot Springs Meadow contains occurrences of *Taraxacum californicum*; however, the data we had did not include the information provided by the peer reviewer. At the time of the proposed rule, we believed that our proposal adequately represented the habitat needed for the conservation of *T. californicum* throughout its range. We proposed critical habitat in Unit 2, which captures the montane meadow referred to by the peer reviewer as North Baldwin Lake. We did not include the habitat at Pan Hot Springs or Arrastre Flat because we did not have data to show that large populations (greater than 10 individuals) of *T. californicum* occupied these areas. Upon receipt of these peer reviewer comments, we reviewed the available information regarding *T. californicum* and determined that the montane meadow habitat in Pan Hot Springs Meadow does support a large population of T.

californicum and meets the definition of critical habitat for *T. californicum* (see ''Summary of Changes from the Proposed Rule'' and the ''Final Critical Habitat Designations'' sections below). In our NOA for the draft EA (73 FR 20600; April 16, 2008), we notified the public that we were considering the inclusion of Unit 1 as critical habitat *for T. californicum* and requested comment on the data that we received from the peer reviewer. We received information from the peer reviewer indicating that Pan Hot Springs Meadow supported 12 *T. californicum* plants this year. Therefore, we determined that Pan Hot Springs Meadow met our criteria for designating critical habitat, and we included this location within Big Bear Valley because it is believed to be the historical core area for both of these species (Soreng 2007, p. 1–2). The areas we included represent the largest populations that still occur for these two species. Although we concluded that Pan Hot Springs Meadow contains the features essential to the conservation of both *Poa atropurpurea* and *T. californicum*, we excluded Unit 1 from the designations of critical habitat under section 4(b)(2) of the Act (16 U.S.C. 1531 *et seq*.) because the benefits of excluding this area outweigh the benefits of including this area in critical habitat (see Comment 9 below and see ''Exclusions Under Section 4(b)(2) of the Act'' section).

*Comment 4*: Two peer reviewers commented on locations not included in the proposed rule that may be important to the long-term conservation of *Poa atropurpurea* and *Taraxacum californicum*. One peer reviewer indicated that montane meadow habitat southeast of Baldwin Lake in and around Shay Meadows and Lake Erwin may ''harbor substantial stands of *P. atropurpurea*.'' The reviewer indicated that this area may not have been surveyed because it is primarily privately owned land. The peer reviewer stated that we should pursue the possibility of surveying this area and consider ways to protect any substantial stands of *P. atropurpurea* that are found. Another peer reviewer expressed concerns that critical habitat was not proposed in the western portion of Big Bear Valley that was historically the core portion of the range for both of these species. The peer reviewer identified three privately owned parcels (China Gardens Meadow, Eagle Point Meadow, and Metcalf Meadow) containing small, extant populations of *P. atropurpurea* and *T. californicum* that were not included in the proposed critical habitat rule and stated that these areas are significant to the overall distribution of both species.

*Our Response*: We believe that these final designations for each species accurately contain all specific areas meeting the definition of critical habitat for *Poa atropurpurea* and *Taraxacum californicum*.

As discussed in the ''Criteria Used to Identify Critical Habitat'' section of the proposed rule and this final rule, we delineated proposed critical habitat for *Poa atropurpurea* and *Taraxacum californicum* using the following criteria: (1) Areas occupied by individuals at the time of listing and areas currently occupied by these species; (2) areas containing one or more of the PCEs for these species (for example, montane meadow habitat); and (3) areas currently occupied by more than 10 individuals of either species. Application of these criteria captures the physical and biological features that are essential to the conservation of these species, identified as the species' PCEs laid out in the appropriate quantity and spatial arrangement. Thus, not all areas supporting the identified PCEs will meet the definition of critical habitat.

The criteria we used resulted in a critical habitat designation that is representative of the diversity in each species' range. The small populations of *Poa atropurpurea* and *Taraxacum californicum* at China Gardens Meadow, Eagle Point Meadow, and Metcalf Meadow are in the developed portions of Big Bear Valley. These areas may have once represented the core populations for these two species, but these populations are reduced, degraded, and fragmented to a point where we no longer believe they substantially contribute to the conservation of these two species. Populations in these meadows did not meet our criteria because no more than 10 plants are documented in each of these meadows. In the areas with no more than 10 plants, we believe it is unlikely that reproduction will occur with enough success for these populations to contribute to the long-term conservation of these species. We included the best representative habitat that remains in Big Bear Valley as critical habitat in these designations (Units 1 (excluded), 2 (designated), and 6 (designated)).

We did not designate critical habitat southeast of Baldwin Lake in and around Shay Meadows and Lake Erwin because we do not have data indicating that *Poa atropurpurea* or *Taraxacum californicum* occur in these areas or that these areas are otherwise essential for the conservation of the species. We believe that the lands we have identified in this rule can adequately support the recovery of *P. atropurpurea* and *T. californicum* through appropriate conservation measures (see the ''Special Management Considerations or Protection'' section for details about the type of management needed for these species).

*Comment 5*: One peer reviewer stated that voucher specimens should be collected to verify the presence of *Poa atropurpurea* because, in the past, this species has been confused with other Poa species (see Curto 1992). Specifically, the peer reviewer did not believe there was adequate documentation of *P. atropurpurea* in Unit 13, Mendenhall Valley, from data provided in the proposed rule. The peer reviewer stated that a voucher specimen has not been collected from Mendenhall Valley since 1981.

*Our Response*: In general, we agree with the peer reviewers' statement that the collection of voucher specimens is important to verify of the presence of *Poa atropurpurea* in areas where the identification is not certain. We encourage repeated visits to confirm continued occupancy, but recommend that populations are vouchered approximately once every 10 years to reduce impacts to the populations. In cases where there are fewer than 20 individuals present, we recommend that no voucher is taken, and instead document the occurrences with photographs, field notes, and a data form. Collections should occur in accordance with all State and Federal regulations and according to standard herbarium practices described in Ross (1996, p. 19). Collections on Federal land require a permit under section 10(a)(1)(A) of the Act and would include sampling restrictions in accordance with the permit. Voucher specimens for this species should include portions of both male and female plants.

Although the last voucher of this population was collected in 1981, we have concluded that that Unit 13, Mendenhall Valley, was occupied by *Poa atropurpurea* at the time of listing as well as at the present time. In 1994, U.S. Forest Service (USFS) botanists documented the presence of 100 *P. atropurpurea* plants in Mendenhall Valley (Volgarino and Winter 1994, pp. 1–2; CNDDB 2006a). Due to the peer reviewer's comment, we contacted the Cleveland National Forest (CNF) and requested additional documentation on this population. They provided monitoring reports from 2001 and 2002 (Davis 2001, pp. 1–2; Davis 2002, p. 1; Winter 2002, pp. 1–5). In 2002, USFS botanists documented 175 *P.*

*atropurpurea* individuals in Mendenhall Valley (Davis 2002, p. 1; Winter 2002, pp. 1–5). Based on this information, we believe the population of *P. atropurpurea* is robust and conclude that the area that supports it meets our definition of critical habitat. We acknowledge the peer reviewers' suggestion that this occurrence should again be vouchered. We discussed this suggestion with the forest botanist at the CNF (Young 2008, p. 1) who recommended we obtain a voucher specimen of *P. atropurpurea* from Mendenhall Valley from USFS land in a year when the *P. atropurpurea* population in this area is relatively abundant.

*Comment 6*: Two peer reviewers expressed concern for the long-term persistence of *Taraxacum californicum* due to hybridization with the nonnative *T. officinale*. The peer reviewers expressed concern that hybrid individuals threaten the listed species through genetic introgression and possibly direct competition with the listed species. The peer reviewers urged the Service to address this issue. One peer reviewer indicated that he observed hybrid individuals in Unit 1 that displayed intermediate characteristics of *T. californicum* and *T. officinale*. Additionally, the peer reviewer stated that *T. officinale* is present in Units 1, 2, 3, and 12, and an active management program should be implemented to remove the nonnative species in these units.

*Our Response*: We agree that *Taraxacum californicum* is threatened by hybridization. The listing rule identified hybridization with the nonnative *T. officinale* as a threat to *T. californicum* at Cienega Seca Meadow (Unit 11) (63 FR 49006, pp. 49016–49017). Further, we discussed hybridization in the proposed rule in the ''Background,'' ''Primary Constituent Elements,'' and ''Final Critical Habitat Designations'' sections of the proposed rule (72 FR 44232, August 7, 2007) and specifically identified hybridization as a threat in units 5, 6, 7, 8, 9, 10, 11, and 12.

As discussed in the ''Primary Constituent Elements'' section of this rule and according to the San Bernardino National Forest's (SBNF) Meadow Habitat Management Guide, habitat invaded by *Taraxacum officinale* may result in hybridization with *T. californicum* and prevent population growth (SBNF 2002a, p. 113). Although *T. officinale* reproduces apomitically (production of viable seeds is not dependent on fertilization), it does produce fertile pollen that can fertilize *T. californicum* (SBNF 2002a, pp. 24, 113). Moreover, the SBNF reported that *T. officinale* is present at all *T. californicum* occurrence locations, and plants that appear to be hybrids between the two species were observed by USFS botanists and others (SBNF 2002a, p. 113; Eliason 2007a, p. 4; Krantz 2007, pp. 1–2, 2008a, p. 1). However, individuals that appear as hybrids could be a result of morphological variation within *T. californicum*. Some scientists believe that observations of hybridization are not conclusive and could use further study (Ellstrand 2007, p. 1). We support further investigation of the hybridization between *T. californicum* and *T. officinale*. Although a formal study documenting that hybridization is occurring between *T. californicum* and *T. officinale* is lacking, we believe that field observations indicate that hybridization may be occurring between these two species (SBNF 2002a, p. 113; CNDDB 2007, pp. 34, 36, 37; Krantz 2007, pp. 1–2, 2008a, p. 1). Therefore, we support the removal of *T. officinale* from montane meadows. This management action will benefit *T. californicum* by reducing direct competition from *T. officinale* and the potential threats of hybridization.

*Comment 7*: One peer reviewer requested that we clarify the contradiction between the statement that under section 7(a)(2) of the Act, critical habitat is purely a protective measure and does not require implementation of restoration, recovery, or enhancement measures (72 FR 44236) and the text stating that each unit may require special management considerations or protection to restore, protect, and maintain the primary constituent elements (72 FR 44237–44243).

*Our Response*: The latter statement relates to the definition of critical habitat under section 3(5)(A) of the Act and the former statement relates to how critical habitat is addressed under section 7(a)(2) of the Act. These two sections of the Act and the discussion on each in the proposed rule do not contradict each other. The Act defines critical habitat as the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. To support our determinations that specific areas meet the definition of critical habitat, we identify in this rule the types of special management considerations or protection the physical and biological features may require (see ''Special Management Considerations or Protection'' section). In this way, critical habitat can assist public agencies and private landowners in identifying management actions that will contribute to the conservation of federally listed species on those lands.

Section 7(a)(2) of the Act applies once critical habitat is identified and designated and requires Federal agencies to ensure that any action they fund, authorize, or carry out is not likely to destroy or adversely modify such designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area, and the consultation requirement under section 7(a)(2) does not mandate that areas designated as critical habitat be affirmatively managed or protected.

*Public Comments*

*Comment 8*: Several commenters stated that the western portion of Unit 1, Pan Hot Springs Meadow, is above the high water line for Lake Baldwin and that this area does not regularly flood. Therefore, the commenters concluded that the area above the high water line for Baldwin Lake does not support the PCEs for *Poa atropurpurea* and they requested that this area be removed from critical habitat. During the third comment period, the Big Bear City Community Service District (BBCCSD) submitted a draft of the Pan Hot Springs Meadow Habitat Management Plan (HMP) for the areas that support *P. atropurpurea* and *Taraxacum californicum*. The HMP included data from a survey the BBCCSD initiated for *P. atropurpurea* and *T. californicum*, as well as three other federally listed plant species that occur in the Pan Hot Springs Meadow. The survey, which was conducted by Dr. Timothy Krantz, showed that the areas supporting *P. atropurpurea* and *T. californicum* in the Pan Hot Springs Meadow are limited to approximately 40 ac (16 ha) in the northwest and central portions of the area that was proposed as critical habitat Unit 1 (Krantz 2008b, pp. 3–8, 12, map). Additionally, we received information during the third comment period from the USFS indicating that no meadow habitat or known occurrences of *P.*

*atropurpurea* or *T. californicum* exist in the area proposed as critical habitat Unit 1 north of State Route 18, and that this area is not part of the hydrologic system supporting the meadow south of State Route 18 (Holtrop 2008, p. 1–2). One commenter stated that we could remove Unit 1 from critical habitat because recovery for *P. atropurpurea* can be achieved with the conservation measures that are in place at other areas where this species occurs. This commenter specifically indicated that other areas (Wildhorse Meadow, Holcomb Valley, and other non-specific locations) outside of Unit 1 provide adequate conservation for *P. atropurpurea*, and therefore Unit 1 is not essential to the conservation of the species.

*Our Response*: We appreciate the information provided by the commenters. Based on the information provided, we reanalyzed the boundaries for proposed critical habitat Unit 1 and found that the majority of the area that we proposed as Unit 1 lacks the physical and biological features essential for the conservation of *Poa atropurpurea* and *Taraxacum californicum*. We removed three locations from the area proposed as Unit 1 that do not contain the PCEs: (1) 24 ac (10 ha) that are elevated above the montane meadow and have species such as *Artemisia tridentata* (Great Basin Sage) that are too dry to support *P. atropurpurea* and *T. californicum* and do not contain the PCEs; (2) 19 ac (8 ha) north of State Route 18 where wet meadow habitat does not exist; and (3) 12 ac (5 ha) of drier meadow habitat where surveys confirmed that *P. atropurpurea* and *T. californicum* do not occur. Additionally, we removed 47 ac (19 ha) of extremely wet meadow habitat in the east portion of the area proposed as Unit 1 that regularly floods from Baldwin Lake because the area does not meet the criteria used to identify critical habitat, occurs outside of the potential dispersal distance from known occurrences, and therefore is not likely to contribute to the conservation of *P. atropurpurea* and *T. californicum*. We concluded that these lands are unlikely to support recovery or contribute to the long-term conservation for *P. atropurpurea* or *T. californicum*. Finally, we determined that 40 ac (16 ha) in Unit 1 meet the definition of critical habitat for *P. atropurpurea* and *T. californicum*; we refer to this area as ''essential lands.'' In our NOA for the draft EA (73 FR 20600; April 16, 2008), we notified the public that we received input during the public comment process on Unit 1 and that we would possibly modify the critical habitat boundary of this unit to reflect the best scientific and commercial data available.

We believe the 40 ac (16 ha) of Unit 1 meet the definition of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* because this unit provides the physical and biological features essential to the conservation of these species in Big Bear Valley, an area that historically represented the core of both species' distributions. Additionally, Pan Hot Springs Meadow is unique as it supports one of the few *P. atropurpurea* occurrences in Big Bear Valley that has not been severely degraded by development or other human impacts. However, the BBCCSD initiated long-term conservation of Unit 1 by drafting, adopting, and implementing the Pan Hot Springs Meadow HMP (discussed detail below, in response to Comment 9). Furthermore, the economic analysis indicates that there are disproportionate and potentially significant costs to the BBCCSD attributable to the designation of critical habitat. We balanced the benefits of including the remaining portion of Unit 1 in the designation for each species against the benefits of excluding it under section 4(b)(2) of the Act and determined that the benefits of exclusion outweigh the benefits of inclusion. Therefore, we excluded the 40 ac (16 ha) of essential lands now identified in Unit 1 from critical habitat (see also response to Comment 9 and ''Exclusions Under Section 4(b)(2) of the Act'' section).

Finally, in response to the commenter who indicated that Unit 1 might not meet the definition of critical habitat for *Poa atropurpurea* because other areas are already conserved for this species, we provide the following response. Although historical occurrences of *P. atropurpurea* are known from one location (Wildhorse Meadow) identified by the commenter, we did not include this area in our proposed designation because this species has not been observed at Wildhorse Meadow for several years, despite recent survey efforts. We do not have additional information regarding conservation for *P. atropurpurea* for the other areas identified by the commenter. Holcomb Valley supports *P. atropurpurea*, and we designated this area as critical habitat (referred to in this document as Unit 4: Hitchcock Meadow). We do not have data on the non-specific areas provided by the commenter to indicate that those areas are occupied by *P. atropurpurea* or contain the physical and biological features essential to the conservation of the species. A limited number of sites *where P. atropurpurea* occurs (for example, on Forest Service and or Wildlands Conservancy lands) have minimal conservation measures in place (for example, limited grazing and control over public access). However, too few locations, including those under Federal ownership, receive the type of conservation protections needed to ensure the survival and recovery of *P. atropurpurea* and *Taraxacum californicum* (see ''Special Management Considerations or Protection'' section). Unauthorized and uncontrolled human access continues to threaten most montane meadows where these species occur, and in many meadows the hydrology has been altered to further threaten the survival of these species. Therefore, the existing conservation for *P. atropurpurea*, as highlighted by the commenter, does not affect our conclusion that the 40 ac (16 ha) of essential lands identified in Unit 1 meet the definition of critical habitat for *P. atropurpurea*.

*Comment 9*: Several commenters stated that the western portion of the area proposed as Unit 1, Pan Hot Springs Meadow, is the site of a future recreational park for the Big Bear community. The community park is planned in two phases: Phase One is located outside of the area proposed as Unit 1, and Phase Two is located within the area proposed as Unit 1. The commenters indicated that the development of Phase Two of the park would not impact the sensitive resources (for example, the habitat for *Poa atropurpurea*) in this area, but because the area proposed as critical habitat in Unit 1 was poorly delineated the designation of critical habitat would impact the ability of the BBCCSD to develop Phase Two of the proposed park. The commenters explained that the designation of critical habitat could, therefore, limit the recreational opportunities for the residents of and visitors to the Big Bear area. One commenter stated that the park may include a museum or interpretive signs to describe the traditions and history of Native Americans who historically inhabited the area and therefore may benefit the Native American community and others.

The commenters requested that we exclude the western portion of Unit 1 (or make accommodations in the final decision), so that the plans for the recreational park and cultural interpretation of the site are not impacted. One commenter stated that Unit 1 should be excluded from critical habitat because the benefits of exclusion outweigh the benefits of inclusion. As mentioned above in Comment 8, the BBCCSD submitted a draft HMP for the

areas in Unit 1 that support occurrences of *Poa atropurpurea* and *Taraxacum californicum* as well as three other federally listed plant species. The HMP outlines the preservation and management of the federally listed plants in Unit 1 (Pan Hot Springs Meadow) and the areas that are essential to the maintenance of the existing hydrological conditions (Krantz 2008b, p. 12). The commenter indicated that the HMP will provide for the long-term management and conservation of *P. atropurpurea* and *T. californicum* within the areas essential to these species. The commenter stated that exclusion of critical habitat would benefit this new partnership between the BBCCSD, the adjacent landowner, and several other stakeholders, including the Service, USFS, University of Redlands, and the San Manuel Band of Serrano Mission Indians. Additionally, the commenter believes that designation of critical habitat may impede the development of these partnership opportunities. Finally, the commenter indicated that in addition to the implementation of the HMP, the BBCCSD may pursue the creation of a Natural Community Conservation Plan or a mitigation bank to further protect this area.

*Our Response*: Under Section 4(b)(2) of the Act, designations of critical habitat are made on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact. The Secretary may exclude any area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

After determining all areas that meet the definition of critical habitat under section 3(5)(A) of the Act, we took into consideration the economic impact, the impact on national security, and other relevant impacts, of specifying any particular area as critical habitat. This analysis included the areas in Unit 1, which some commenters requested that we exclude from critical habitat. We worked cooperatively with the BBCCSD and the adjacent landowner in development of the HMP and long-term management of the entire Pan Hot Springs Meadow area. We provided comments on the HMP that the BBCCSD incorporated into the plan. This voluntary preservation and management plan on private lands addresses recovery needs for the two federally endangered plants addressed in these critical habitat designations as well as three other federally-listed plant species that occur in Pan Hot Springs Meadow. The BBCCSD has also initiated discussions with the San Manuel Band of Serrano Mission Indians to include them as a partner and participant in the planning process, including development of an educational program for this area. We continue to work closely with the landowners in Pan Hot Springs Meadow through the development and implementation of the HMP and coordination on implementation of other conservation measures throughout the meadow area. We believe the partnership with the landowners and adjacent landowners will provide for the long-term conservation of *P. atropurpurea* and *T. californicum* in Pan Hot Springs Meadow. As a result, we evaluated the commitment to implementing the HMP and our partnership with the private landowners during our analysis for exclusion under section 4(b)(2) of the Act. Except to prohibit certain actions that occur in knowing violation of State law, the Act does not provide protections for federally-listed plants on private land, such as Pan Hot Springs Meadow, unless the actions on private land that may adversely affect listed plants involve a Federal nexus, and it is unlikely there would be a Federal nexus to trigger a section 7 consultation on the lands within Pan Hot Springs Meadow. As fully explained later in this rule, we excluded Unit 1 from the critical habitat designations under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section for details).

*Comment 10*: One commenter stated that he owns land within Unit 1, Pan Hot Springs Meadow, which contains wells producing water from geothermal sources. This landowner stated that he also owns the water rights associated with the wells. The commenter indicated during the public hearing and in an additional comment letter submitted during the third comment period that he would dedicate water from his private source to maintain the hydrology that is critical to supporting *Poa atropurpurea* and *Taraxacum californicum* in Pan Hot Springs Meadow. The commenter indicated that he would like to participate and contribute his support to the HMP that the BBCCSD has developed. The landowner also provided us with information about some of his future development plans for his land adjacent to Pan Hot Springs Meadow, indicating that his plans would proceed in a way that protects the meadow habitat and associated flora and fauna, as well as maintain the current hydrology of Pan Hot Springs Meadow.

*Our Response*: The Service is committed to working with landowners in Unit 1 to conserve *Poa atropurpurea* and *Taraxacum californicum* and the PCEs within this unit and applauds the initiative taken by both the BBCCSD and this private landowner to conserve the Pan Hot Springs Meadow. We excluded Unit 1 from critical habitat as discussed above in the response to Comments 8 and 9. We believe that development projects near the Pan Hot Springs Meadow will incorporate conservation measures to maintain meadow habitat and the hydrology of the meadow. In the process of finalizing the Pan Hot Springs Habitat Management Plan, thelandowner who made the above comments actively participated in the review of the HMP, is committed to implementing of the HMP, and is committed to conservation of the Pan Hot Springs Meadow. The BBCCSD and this landowner plan to work with other partners in the adaptive management of Pan Hot Springs Meadow for the benefit of *P. atropurpurea* and *T. californicum*. The landowner's commitment made in his public comments on this rule indicate that the use or development of his geothermal wells (otherwise known as Pan Hot Spring) will help maintain the hydrological conditions within the range of what is considered natural for this meadow. By returning clean water to the meadow ecosystem, this action will help ensure that the hydrological processes that help maintain the meadow will be preserved. As stated above, in the response to Comment 9, we balanced the benefits of inclusion against the benefits of exclusion and determined that the benefits of exclusion outweigh the benefits of inclusion for those areas within the Pan Hot Springs Meadow. Therefore, we have excluded Unit 1 from critical habitat (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

*Comment 11*: One commenter stated that the designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* were flawed because some known occurrences of these two species were not proposed as critical habitat. The commenter requested that we include all occupied occurrences in the critical habitat, or provide scientific reasons for not including specific areas. Additionally, the commenter cited Leppig and White (2006) to demonstrate that peripheral populations are generally small in size, but still considered important for conservation purposes.

*Our Response*: The commenter did not provide any new data to indicate

that the information we provided in the proposed critical habitat designations was incorrect or incomplete. The commenter listed all areas historically occupied by these species that we had not included in the proposed critical habitat and requested that we include these areas. We are unaware of any data on population size for most historical occurrences. Without recent information about the status and size of a population, we are unable to determine that these lands satisfy the criteria we identify in this rule for critical habitat or to discern the importance of these particular locations to the overall conservation of these species. We are required to use the best scientific and commercial data available to designate critical habitat. Thus, we developed this critical habitat based on verifiable field observations and documentation of the condition of occupied habitat (CNDDB 2005a, 2005b, 2006a, 2006b; USFS 2002a). Additionally, we included peripheral populations in these designations as described in Leppig and White (2006, p. 264). For both species we included occupied meadow habitat at the edges of the range and at the highest and lowest occurrences. For additional information about why we did not include all occupied habitat in these designations, see our response to Comment 4 and the discussion in the rule below under ''Criteria Used To Identify Critical Habitat.''

*Comment 12*: One commenter stated that the proposed designations are flawed because they do not include unoccupied habitat for recovery, and that without including some suitable, but unoccupied, habitat (areas with one or more of the PCEs) in the critical habitat designations to promote the recovery of *Poa atropurpurea* and *Taraxacum californicum*, the Service will not be able to meet the Act's recovery goals and mandate.

*Our Response*: We identified areas within the geographical range of *Poa atropurpurea* and *Taraxacum californicum* that were occupied at the time of listing and contain the physical and biological features essential to the conservation of these species that may require special management considerations or protection. We designate critical habitat in areas outside the geographical area presently occupied by the species only when such a designation would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). Accordingly, when the best scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we cannot designate critical habitat in areas outside the geographical area occupied by the species. The critical habitat that we identified for *P. atropurpurea* and *T. californicum* represents areas currently occupied by for these species. The species are also well represented in the occupied habitat designated as critical habitat (see the responses to Comment 2 and 3, above). Therefore, consistent with the Act and its implementing regulations, we are not designating any lands outside the area currently occupied by *P. atropurpurea* and *T. californicum* because at this time we believe that the occupied areas we have designated are adequate to ensure the conservation of the species. Therefore, we have determined that there are no unoccupied areas that are essential for the conservation of the species.

*Comments from Other Federal Agencies*

*Comment 13*: The USFS provided specific information regarding areas in Unit 14 and Unit 15 that do not support the PCEs for *Poa atropurpurea*. The USFS stated that Unit 14 (as proposed) included areas that are developed as campgrounds and recreational residences. They also stated that portions of Unit 14 are dense Jeffery Pine forest rather than meadow habitat. The USFS indicated that Unit 15 (as proposed) included red shank, chamise, and oak woodland vegetation types in addition to meadow habitat. The USFS requested that we remove areas from the proposed designations that do not support the PCEs for *P. atropurpurea* and requested that the areas outside of the meadow habitat not be designated as critical habitat.

*Our Response*: We received additional data from the USFS in response to their comment, including maps of the vegetation in and around the proposed critical habitat units. We also conducted site visits with staff from the CNF on January 24, 2008, and March 28, 2008. We are in agreement with the USFS and found that some areas in proposed Units 14 and 15 do not contain the features essential to the conservation of *Poa atropurpurea*. Therefore, we removed approximately 301 ac (122 ha) of forested habitat in Unit 14 and approximately 66 ac (26 ha) of oak woodland, sage brush scrub, chaparral, and dry meadow habitat from Unit 15 and revised our mapping accordingly to reflect the revised unit boundaries. As a result of these revisions, Unit 14 decreased by 301 ac (122 ha) and now totals 788 ac (319 ha), and Unit 15 decreased by 66 ac (26 ha) and now totals 36 ac (15 ha).

*Comment 14*: The USFS commented that laws, regulations, policies, and Land Management Plan (LMP) direction currently in place provide protection at least equivalent to the protection that a critical habitat designation would provide. The USFS requested that lands proposed as critical habitat for *Poa atropurpurea* and *Taraxacum californicum* in the SBNF and the CNF be excluded from the final designations of critical habitat. They stated that their LMP incorporates management direction that provides sufficient protection and management for *P. atropurpurea* and *T. californicum* and the habitat for these two species, and that the section 7 consultation on the LMP resulted in the Service coming to a similar conclusion, which resulted in the issuance of a non-jeopardy biological opinion (Service 2005, pp. 203–207, 213–219). Additionally, Appendix H of the LMP includes the ''Meadow Habitat Management Guide'' for the SBNF (SBNF 2002a) and the ''Habitat Management Guide for the Sensitive Plant Species: *Delphinium hesperium* ssp. *cuyamacae*, *Lilium parryi*, Limnanthes gracilis var. parishii, and *P. atropurpurea*, in Riparian Montane Meadows'' for the CNF (CNF 1991). The USFS commented that designation of critical habitat on SBNF and CNF lands would not provide any additional benefit to the conservation of the species or their habitat because all site-specific projects proposed by the SBNF and CNF are subject to section 7(a)(2) consultation with the Service. The USFS stated that the designations would unnecessarily add to their analysis burden by requiring SBNF and CNF to make a determination of effect regarding critical habitat when consulting under section 7 of the Act. The USFS acknowledged their responsibility to conserve listed species and stated that they will continue to provide necessary management, regardless of the outcome of the final critical habitat rule.

*Our Response*: We determined that National Forest lands contain the physical and biological features essential to the conservation of *Poa atropurpurea* and *Taraxacum californicum*, and meet the definition of critical habitat (see ''Criteria Used to Identify Critical Habitat'' section below). We acknowledge that the revised LMP will benefit *P. atropurpurea* and *T. californicum* and their habitat. The LMP contains general provisions for species conservation and suggests specific management and conservation actions that will benefit these species and the physical and biological features essential to their conservation. Implementation of the LMP should

address known threats to these species on National Forest lands. However, the LMP is a guidance document and does not require or assure funding for management actions for those measures outlined in the plan. Additionally, the LMP does not preclude projects from occurring outside of the framework of the plan that could negatively impact areas proposed as critical habitat. We appreciate and commend the efforts of the USFS to conserve federally listed species on their lands.

The Secretary has the discretion to exclude an area from critical habitat under section 4(b)(2) of the Act after taking into consideration the economic impact, the impact on national security, and any other relevant impact if he determines that the benefits of such exclusion outweigh the benefits of designating such area as critical habitat, unless he determines that the exclusion would result in the extinction of the species concerned. We have considered the request from the SBNF and the CNF that we exclude their lands because it would unnecessarily add work in the future to determine the effect regarding critical habitat for actions on their lands and the fact that they had already completed consultation under section 7(a)(2) of the Act on their revised LMP.

As part of our section 7 consultation with the USFS on the LMP for the SBNF and the CNF, the USFS has already consulted on various activities carried out on National Forest lands including: Roads and trail management; recreation management; special use permit administration; administrative infrastructure; fire and fuels management; livestock grazing and range management; minerals management; and law enforcement. In our 2005 biological opinion on the LMP, we determined that implementation of the plan was not likely to jeopardize the continued existence of *Poa atropurpurea* or *Taraxacum californicum* (Service 2005, pp. 202–207, 213–219). Since critical habitat has not been previously proposed or designated for these species, it is anticipated that the consultation with the USFS regarding their current LMP will be reinitiated. However, because the USFS has already consulted with us on potential impacts to these species related to the activities outlined in the LMP, the USFS can supplement its analysis for those activities already analyzed in the LMP with the additional analysis required for critical habitat areas. We do not believe that this additional analysis would place an undue burden on the USFS in this case.

Based on the record before us, we have elected not to exclude these lands and are designating National Forest lands that meet the definition of critical habitat for *Poa atropurpurea* and *Taraxacum californicum*. We will continue to consider on a case-by-case basis in future critical habitat rules whether to exclude specific lands from such designation when we determine that the benefits of such exclusion outweigh the benefits of their inclusion.

*Comments from the San Manuel Band of Serrano Mission Indians*

*Comment 15*: The San Manuel Band of Serrano Mission Indians expressed opposition to the proposed rule because: (1) we misidentified the San Manuel Band of Serrano Mission Indians as the ''San Miguel Band of Mission Indians'' in the NOA for the draft EA that published in the **Federal Register** on April 16, 2008 (73 FR 20600); (2) we did not adequately recognize the traditional legal rights of the San Manuel Band of Serrano Mission Indians by failing to recognize the San Manuel Band of Serrano Mission Indians' consistent historical and traditional use of the area identified as proposed Unit 1 and surrounding areas, which have not been relinquished or abandoned; (3) we did not incorporate the policy directive of Executive Order (E.O.) 13007 by taking into account the unique and specific issues of the San Manuel Band of Serrano Mission Indians, which include traditional, religious, and cultural rights identified in proposed Unit 1 and surrounding areas; and (4) the proposed rule does not sufficiently incorporate our responsibility to maintain the government-to-government consultation policy as described in the Secretarial Order No. 3206, dated June 28, 2004.

*Our Response*: With regard to the inadvertent misidentification of the San Manuel Band of Serrano Mission Indians in the April 2008 NOA for the draft EA, although we became aware of this error just prior to the publication of the NOA, we were unable to correct the name in the published document; however, we did correctly identify the San Manuel Band of Serrano Mission Indians in the media bulletin and other public outreach materials that accompanied publication of the NOA. Although we certainly regret the accidental misidentification of the San Manuel Band of Serrano Mission Indians in the NOA, it did not materially affect the biological rationale behind the initial proposal of critical habitat. In this final rule we correctly identify the San Manuel Band of Serrano Mission Indians.

It was not our intent to disregard the presence of the Tribal resources that occur in the vicinity of Unit 1 of the proposed critical habitat. Following publication of the August 7, 2007, proposed rule (72 FR 44232), a private citizen presented us with information identifying historical, religious, and cultural resources important to the San Manuel Band of Serrano Mission Indians in proposed Unit 1, although these lands are not specifically part of the Tribal Trust lands of the San Manuel Band of Serrano Mission Indians. In the April 16, 2008, NOA for the draft EA (73 FR 20600), we specifically solicited comments from the San Manuel Band of Serrano Mission Indians regarding the potential impacts of the proposed rule on the San Manuel Band of Serrano Mission Indians. We requested this input from the San Manuel Band of Serrano Mission Indians in accordance with Secretarial Order 3206 section 3(B)(4) and E.O. 13007. On April 15, 2008, we transmitted a letter to the San Manuel Band of Serrano Mission Indians indicating our interest in discussing the proposed designations of critical habitat and requested information from the San Manuel Band of Serrano Mission Indians that would contribute to the decision process. On May 12, 2008, we received an electronic mail response to our letter indicating that the San Manuel Band of Serrano Mission Indians would like to coordinate with us to discuss the critical habitat designations. We subsequently met with representatives of the San Manuel Band of Serrano Mission Indians. Through this coordination, we believe we addressed the concerns of the San Manuel Band of Serrano Mission Indians in this final rule. As a result of our coordination and analysis of all information available, we concluded that the designation of critical habitat would not adversely impact the San Manuel Band of Serrano Mission Indians. We recognize that the San Manuel Band of Serrano Mission Indians' ancestral lands include the San Bernardino Mountains, including areas that we have designated as critical habitat. From our discussion with the representatives of the San Manuel Band of Serrano Mission Indians, we do not believe that activities that the San Manuel Band of Serrano Mission Indians regularly conducts on federally owned lands included in these designations will negatively impact the PCEs or adversely modify critical habitat. We do not believe that these activities will require a section 7 consultation due to the designation of critical habitat. The designation of critical habitat will not impose any regulatory or restrictive authority over the San Manuel Band of Serrano

Mission Indians nor change access to or restrict Tribal activities on designated lands. Additionally, we determined that the benefits of exclusion outweigh the benefits of inclusion for the essential lands within Unit 1 identified in this rule and covered by the HMP, which includes historical, religious, and cultural resources important to the San Manuel Band of Serrano Mission Indians, and we excluded Unit 1 from critical habitat (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

*Comments Related to the Draft Economic Analysis*

*Comment 16*: One comment from the USFS stated that while the draft EA quantified one formal section 7 consultation on a revision of the LMP for both the SBNF and CNF, the two national forests will conduct these consultations separately, and that the CNF portion of the ongoing effects consultation will be combined with the informal consultation on the CNF's livestock grazing program in Units 13, 14, and 15. The comment further stated that the formal section 7 consultation on a revision of the LMP in the SBNF will cover existing ongoing effects from mining related activities in the national forest, and any future consultations would be driven by proposed plans of operations. Therefore, the formal consultation on active mining claims in the SBNF quantified in the draft EA should be combined with the consultation on a revision of the LMP in the SBNF.

*Our Response*: Discussions with relevant USFS personnel clarified that the SBNF and the CNF will consult separately on a revision of the LMP. However, the consultation involving the CNF will also be a formal consultation and separate from the consultation on its livestock grazing program. It was further clarified that both consultations involving the CNF are likely to occur in 2009. The discussions also indicated that the formal consultation on a revision of the LMP will cover existing ongoing effects from mining related activities in the SBNF. Sections A.4 and ES.1.3 in the revised EA have been modified to reflect these changes along with relevant changes to administrative costs in the various tables and figures.

*Comment 17*: One commenter stated that the draft EA does not address the potential impact of designating Unit 1 as a critical habitat on plans for developing the property (Pan Hot Springs). The commenter indicated that these plans include building a new hotel on the property in which the geothermal-water-supplied pools would be a major attraction. The commenter further indicated that a water sales business has been in operation since 1997, selling as much as one million gallons a day from the springs on the property.

*Our Response*: Sections 3.1.4 and 8.1 in the draft EA acknowledge the recreational and commercial development plans of the owner of Pan Hot Springs in Unit 1 as communicated by personnel from agencies in the area. During the research and drafting period of the draft EA, despite repeated attempts to contact the landowner, ENTRIX was not able to directly speak with him and confirm the cited plans. Based on the information provided by the landowner in the comment letter, it appears that the planned developments by the landowner would be on the portion of the property that was not included in the proposed critical habitat designation, and it is not clear how development plans and the continued sale of water for commercial purposes will be impacted by the designations of critical habitat, if at all. Therefore, while relevant text in the revised EA has been modified to add the additional information, no changes to anticipated impacts from the designations of critical habitat have been made based on the comment.

The final EA indicates that there are disproportionate and potentially significant costs to the BBCCSD attributable to the designation of critical habitat. In light of these costs, the partnership between the Service, the BBCCSD, and this landowner, and the BBCCSD's commitment to manage and conserve the physical and biological features essential to the conservation of *Poa atropurpurea* and *Taraxacum californicum* as discussed in response to comment 9, we evaluated the area within Unit 1 (as defined in this final rule) for exclusion under Section 4(b)(2) of the Act. We balanced the benefits of inclusion against the benefits of exclusion and determined that the benefits of exclusion outweigh the benefits of inclusion. Therefore, we excluded the area within Unit 1 from critical habitat (see response to Comment 9 and ''Exclusions Under Section 4(b)(2) of the Act'' section) and any economic impact associated with the designations of critical habitat in Unit 1 should be alleviated.

*Summary of Changes From Proposed Rule*

On August 7, 2007, we proposed to designate approximately 3,014 ac (1,221 ha) of land for *Poa atropurpurea* within San Bernardino and San Diego counties, California, and approximately 1,930 ac (782 ha) of land for *Taraxacum californicum* within San Bernardino County, California (72 FR 44232). In this final rule, we concluded that 2,529 ac (1,025 ha) meet the definition of critical habitat for *P. atropurpurea* and that 1,954 ac (791 ha) meet the definition of critical habitat for *T. californicum*. We excluded all essential habitat in Unit 1 under section 4(b)(2) of the Act. Therefore, we are designating approximately 2,489 ac (1,009 ha) of critical habitat for *P. atropurpurea* and approximately 1,914 ac (775 ha) of critical habitat for *T. californicum*. This section presents the differences between what was proposed as critical habitat and what is included in these final designations.

(1) In light of comments received, we re-evaluated the area proposed as critical habitat Unit 1. We reviewed data in our files and conferred with botanists familiar with the species and montane meadow habitat.

(A) New information received indicated that this unit meets our criteria for designating critical habitat for *Taraxacum californicum*. Prior to the publication of the proposed rule, we did not believe that more than 10 *T. californicum* individuals were present in Unit 1. We received information from one peer reviewer that more than a dozen *T. californicum* had been observed in Unit 1 on several occasions. In recent surveys, 12 *T. californicum* plants were documented in Unit 1 (Krantz 2008b, p. 7). This new information indicated that the area is occupied by a successfully reproducing occurrence of *T. californicum* that is essential to the conservation of this species. Therefore, Unit 1 meets the criteria for critical habitat as discussed for *T. californicum*.

(B) We concluded that some areas mapped in the proposed critical habitat designation for Unit 1 do not contain the PCEs (see ''Primary Constituent Elements'' section) or otherwise did not meet our criteria for designating critical habitat for either species (see ''Criteria Used to Identify Critical Habitat'' section below). We removed three areas from the proposed critical habitat Unit 1 that do not contain the PCEs: (1) 24 ac (10 ha) that are elevated above the montane meadow and contain species such as *Artemisia tridentata* (Great Basin Sage) that are too dry to support *P. atropurpurea* and *T. californicum* and do not contain the PCEs; (2) 19 ac (8 ha) north of State Route 18 where wet meadow habitat does not exist; and (3) 12 ac (5 ha) of drier meadow habitat where surveys confirmed that *P. atropurpurea* and *T. californicum* do not occur and PCEs were absent. Additionally, we removed 47 ac (19 ha) of extremely wet meadow habitat in the

eastern portion of the area proposed as Unit 1 that regularly floods from Baldwin Lake. This area is too wet to support *P. atropurpurea* or *T. californicum*; therefore, the area does not meet the criteria used to identify critical habitat. Although this area may contain the physical and biological features essential to the conservation of the species, this area is unoccupied and recent surveys by species experts confirm that this area occurs outside of the potential dispersal distance from known occurrences. Therefore, we concluded that these lands are unlikely to support recovery or contribute to the long-term conservation for *P. atropurpurea* or *T. californicum*. We determined that 40 ac (16 ha) in Unit 1 meet the definition of critical habitat *for P. atropurpurea* and *T. californicum*; we refer to this area as ''essential lands.''

(C) The BBCCSD drafted a HMP for Unit 1, which covers the approximately 40 ac (16 ha) of essential lands identified in this rule within Unit 1. The HMP was approved by the Board of Directors of the BBCCSD on July 7, 2008, and we received assurances that the HMP will be implemented as outlined. Other private landowners coordinated with the BBCCSD and are committed to managing the lands essential to the conservation of *Poa atropurpurea and Taraxacum californicum* for the long-term benefit of these species. As a result of our partnership with the BBCCSD; the development of the HMP; the partnership between BBCCSD and the landowner of the main spring in Unit 1; and the economic impacts to BBCCSD attributed to the designation of critical habitat as analyzed in the final EA, we are excluding the 40 ac (16 ha) of essential lands covered by the HMP from Unit 1. We determined that the benefit of excluding these lands from critical habitat outweighs the benefit of including them in critical habitat and that excluding these lands will not result in the extinction of either *P. atropurpurea* or *T. californicum* (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

(2) We removed 17 ac (7 ha) of forested terrain along the eastern portion of Unit 11. Forested habitat cannot support *Poa atropurpurea* or *Taraxacum californicum* and does not contain the physical and biological features essential to the conservation of the species. We are designating 81 ac (33 ha) in Unit 11 for *P. atropurpurea* and *T. californicum*.

(3) In light of comments made during the public comment period, we re-evaluated the areas proposed as critical habitat in Units 14 and 15 (see comment 13 and response above). We reviewed maps and other material provided by the USFS, conducted a site visit at these two areas with staff from the CNF, and concluded that some areas proposed as critical habitat for *Poa atropurpurea* do not contain the physical and biological features, could not support *P. atropurpurea* occurrences, and do not meet the definition of critical habitat. Therefore, we revised our mapping to more accurately capture the PCEs in these two units. We removed 301 ac (122 ha) of densely forested habitat from Unit 14 and 66 ac (26 ha) of oak woodland, sage brush scrub, chaparral, and dry meadow habitat from Unit 15. As a result of these revisions, we are designating 788 ac (319 ha) in Unit 14 and 36 ac (15 ha) in Unit 15 for *P. atropurpurea*. These revisions constitute a total reduction of 367 ac (148 ha) from the proposed critical habitat for *P. atropurpurea*.

**Critical Habitat**

Critical habitat is defined in section 3 of the Act as:

(i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) essential to the conservation of the species and

(b) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing actions that are likely to result in the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests Federal agency funding or authorization for a discretionary action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features that are essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species. These areas contain the PCEs, which are laid out in the appropriate quantity and spatial arrangement for the conservation of the species. Under the Act, we can designate as critical habitat areas outside the geographical area occupied by the species at the time it was listed only when we determine that the best available scientific data demonstrate that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed

journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that we may eventually determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not contribute to the recovery of the species.

Areas that support populations, but are outside the critical habitat designations, will continue to be subject to conservation actions we and other Federal agencies implement under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if information available at the time of these planning efforts calls for a different outcome.

**Methods**

As required by section 4(b) of the Act, we use the best scientific data available in determining areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of *Poa atropurpurea* and *Taraxacum californicum* respectively, and areas outside the geographical area occupied at the time of listing that are essential for the conservation of *P. atropurpurea* and *T. californicum* individually. We have also reviewed available information that pertains to the habitat requirements of these species. These sources of information included, but were not limited to, the proposed (60 FR 39337; August 2, 1995) and final (63 FR 49006; September 14, 1998) rules to list these species; data and information published in peer-reviewed articles; data and information contained in reports prepared for or by the USFS; discussions with species experts including USFS personnel; data and information presented in academic research theses; data provided by the California Natural Diversity Database (CNDDB); herbarium records; data submitted during section 7 consultations; and regional Geographic Information Systems (GIS) data.

**Primary Constituent Elements (PCEs)**

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to designate as critical habitat, we consider the physical we consider the physical and biological features that are essential to the conservation of the species to be the primary constituent elements laid out in the appropriate quantity and spatial arrangement for conservation of the species. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We derive the specific primary constituent elements (PCEs) required for *Poa atropurpurea* and *Taraxacum californicum* from the biological needs of each species as described in the final listing rule published in the **Federal Register** on September 14, 1998 (63 FR 49006), the proposed critical habitat rule published in the **Federal Register** on August 7, 2007 (72 FR 44232), and information below.

*Space for Individual and Population Growth, and Nutritional Requirements*

Open-canopy forested areas supporting relatively undisturbed, wet meadows subject to flooding during wet years support growth, reproduction, and pollination (by wind for *Poa atropurpurea*, by insects for *Taraxacum californicum*) for both species (SBNF 2002a, p. 109; Curto 1992, p. 12). Additionally, *T. californicum* occurs in smaller forest openings with seeps, springs, or creeks. Due to the relatively small size of these forest openings, these areas are not generally mapped or named as meadows. We have referred to these areas as ''un-named meadow areas'' (see Tables 1 and 2 in the August 7, 2007, proposed rule (72 FR 44232)). Both species require non-compacted or non-eroded soils for reproduction, growth, and survival (Curto 1997, p. 12). Invasive, nonnative species may compete for open, bare ground and reduce space available for growth (Curto 1992, p. 10). Invasive, nonnative species can also alter the habitat for these two species by creating thatch that covers the bare ground and by using water resources that *P. atropurpurea* and *T. californicum* need for survival. Therefore, these species require micro-habitats free of nonnative, invasive competitors. *Poa atropurpurea* is *dioecious*, meaning that individual plants of this species are either male or female. Individual male and female plants require an occupied meadow for successful, sexual reproduction to occur. Habitat invaded by nonnative species may not provide ideal growing conditions for *P. atropurpurea* or *T. californicum* due to competition for resources, and areas populated by *T. officinale* may result in hybridization with *T. californicum* (SBNF 2000, p. 40; SBNF 2002a, p. 114). Both species require a perennial water source, which exists in relatively intact, wet meadow systems (Service GIS database; Eliason 2007b, p. 1).

Soils occupied by *Poa atropurpurea* have been characterized as loamy alluvial to sandy loam (CNDDB 2006a, pp. 1–21) that experience periodic saturation by water (Volgarino *et al.* 2000a, p. 1; Hirshberg 1994, p. 1). In a distribution study of *P. atropurpurea*, Krantz (1981, p. 8) noted that in San Bernardino County the species usually occurs in open (50 percent bare ground) soils with some clay content in the A horizon (0 to 12 inches (in) (0 to 30 centimeters (cm)). However, Krantz (1981, p. 8) also stated that the Laguna Meadow population in San Diego County had somewhat different habitat parameters than the populations in San Bernardino County. Volgarino *et al.* (2000a, p.1) listed United States Department of Agriculture (USDA) soil series for a partial list of meadows in which *P. atropurpurea* occurs in San Diego County as Lu (loamy alluvial land) (Bowman 1973, p. 64), Rieff (Bowman 1973, pp. 72–73), and Crouch (Bowman 1973, pp. 41–42). Volgarino *et al.* (2000a, p.1) listed USDA soil series for a partial list of meadows in which *P. atropurpurea* occurs in San Bernardino County as Morical (USDA 2004, p. 1), Hodgson (USDA 2005a, p. 1), Hecker (USDA 1997a, p. 1), Avawatz (USDA 1978, p. 1), Oak Glen (USDA 2003, p. 1), Olete (USDA 1999a, p. 1), Goulding (USDA 1999b, p. 1), Pacifico

(USDA 2000b, p. 1), and Preston (USDA 1998, p. 1). The soil series descriptions cited above support the general ''loamy alluvial to sandy loam'' characterization of P. atropurpurea habitat soils (CNDDB 2006a, pp. 1-21).

Soils occupied by *Taraxacum californicum* appear similar to those occupied by *Poa atropurpurea*. Volgarino *et al*. (2000b, p.1) listed USDA soil series for a partial list of meadows in which *T. californicum* occurs as Morical (USDA 2004, p. 1), Hodgson (USDA 2005a, p. 1), Hecker (USDA 1997a, p. 1), Pacifico (USDA 2000b, p. 1), Preston (USDA 1998, p. 1), Merkel (USDA 2005b), and Wapal (USDA 2005c, p. 1). Similar to *P. atropurpurea*, the soil series descriptions cited above also support a general ''loamy alluvial to sandy loam'' characterization of *T. californicum* habitat soils.

Both species appear to differ in their ability to colonize steeper slopes. Volgarino *et al*. (2000a, p. 2; 2000b, p. 2) described slopes on which *Poa atropurpurea* occurs as 0 to 16 percent (with potential for occurrence on steeper slopes), and slopes on which *Taraxacum californicum* occurs as 0 to 46 percent. This difference in maximum slope may be due to *P. atropurpurea* occurring farther from the banks of meadow water courses than *T. californicum*.

*Primary Constituent Elements for Poa atropurpurea and Taraxacum californicum*

Within the geographical area occupied by *Poa atropurpurea* and *Taraxacum californicum* at the time of listing, we must identify the physical and biological features that may require special management considerations or protection. All areas designated as critical habitat for these two species are occupied, within the species' respective historical geographic ranges, and contain the PCEs in the appropriate quantity and spatial arrangement required to support at least one life history function. The range of parameters and information provided in the PCEs identified below has been generalized from existing scientific data. There may be cases where *P. atropurpurea* or *T. californicum* persist in conditions outside the ranges expressed in the PCEs. It is also important to note that the variable amounts and timing of precipitation in southern California do not result in favorable conditions for *P. atropurpurea* and *T. californicum* in every year.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we determined that the PCEs for *Poa atropurpurea* are:

(1) Wet meadows subject to flooding during wet years in the San Bernardino Mountains in San Bernardino County at elevations of 6,700 to 8,100 feet (2,000 to 2,469 meters), and in the Laguna and Palomar Mountains of San Diego County at elevations of 6,000 to 7,500 feet (1,800 to 2,300 meters), that provide space for individual and population growth, reproduction, and dispersal; and

(2) Well-drained, loamy alluvial to sandy loam soils occurring in the wet meadow system, with a 0 to 16 percent slope, to provide water, air, minerals, and other nutritional or physiological requirements to the species.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we determined that the PCEs for *Taraxacum californicum* are:

(1) Wet meadows subject to flooding during wet years and forest openings with seeps, springs, or creeks in the San Bernardino Mountains in San Bernardino County located at elevations of 6,700 to 9,000 feet (2,000 to 2,800 meters), that provide space for individual and population growth, reproduction, and dispersal; and

(2) Well-drained, loamy alluvial to sandy loam soils occurring in the wet meadow system or forest openings with seeps, springs, or creeks, with a 0 to 46 percent slope, to provide water, air, minerals, and other nutritional or physiological requirements to the species.

These designations are designed for the conservation of those areas containing the PCEs laid out in the appropriate quantity and spatial arrangement (the physical and biological features) necessary to support one or more of these species' life history functions. All units in these designations contain the physical and biological features and support multiple life processes.

**Special Management Considerations or Protection**

When designating critical habitat, we assess whether the areas occupied at the time of listing contain the features essential to the conservation of the species that may require special management considerations or protection. Major threats to *Poa atropurpurea* and *Taraxacum californicum*, and, therefore, to the features essential to their conservation, include development on private lands, grazing, off-highway vehicle (OHV) use, road maintenance activities, ground disturbance that affects surface hydrology, mining activities, recreational activities, habitat fragmentation, and the invasion of nonnative herbaceous plants. Please refer to the unit descriptions in the ''Final Critical Habitat Designations'' section for further discussion of special management considerations or protection of the physical and biological features related to geographically specific threats to *P. atropurpurea* and *T. californicum*.

Special management considerations or protection of the wet meadows may be needed to address concerns such as reducing nonnative plant invasions and maintaining populations. Control and monitoring of nonnative, invasive plant species may be required to maintain wet meadows and or forest openings such that they can continue to support populations of *Poa atropurpurea* and or *Taraxacum californicum*. Nonnative species alter the meadow habitat by creating mats of thatch which cover bare ground needed for *P. atropurpurea* and *T. californicum* to become established, and also use water resources that could be used by *P. atropurpurea* and *T. californicum*. The growth of nonnative species may adversely impact and change the physical and biological features of the meadow habitat. Implementing management actions that support fertilization and seed set of *P. atropurpurea* (Curto 1992, p. 11; Soreng 2000, pp. 1–4), and provide monitoring and protection of male *P. atropurpurea* clones may be required to maintain populations of *P. atropurpurea*.

Special management considerations or protections for wet meadow habitat may need to be implemented to control the impacts associated with direct competition and hybridization caused by the nonnative *Taraxacum officinale*. This nonnative species occupies open niches, which can reduce the bare ground needed for *T. californicum* to become established, and may alter the physical and biological features of the meadow habitat. Management may include the removal of *T. officinale* from montane meadows where this species co-occurs with *T. californicum*. Additionally, it may be appropriate to remove hybridized individuals; however, we believe this course of action warrants further investigation.

There are two USFS management guides that address conservation of *Poa atropurpurea* and *Taraxacum californicum*: (1) The CNF Habitat Management Guide for the Sensitive

Plant Species: *Delphinium hesperium* ssp. *cuyamacae*, *Lilium parryi*, *Limnanthes gracilis* var. *parishii*, and *P. atropurpurea*, in Riparian Montane Meadows (CNF 1991, pp. 1–36) addresses conservation *of P. atropurpurea*; and (2) the SBNF Meadow Habitat Management Guide (SBNF 2002a pp. 1–155) addresses conservation of both species. In some cases, significant management actions have been implemented by the USFS (for example, cattle exclosures in Laguna Meadow (CNF 1991, p. 17), recreational trail closures in Belleville Meadow near Big Bear Lake (SBNF 2002a, p. 5)).

**Criteria Used To Identify Critical Habitat**

We are designating critical habitat in areas that we determined were occupied at the time of listing and that contain sufficient primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement (the physical and biological features) to support life history functions essential for the conservation of *Poa atropurpurea* and *Taraxacum californicum*. We did not designate unoccupied areas for these two species because we believe that the areas designated are adequate to ensure the conservation of these species through appropriate conservation measures, such as the removal of invasive species, the protection and restoration of the hydrology in occupied meadows, and the reduction of negative human impacts in occupied habitat (for details on management actions see the ''Special Management Considerations and Protection'' section). To delineate critical habitat, we identified habitat that contains features essential to the conservation of *P. atropurpurea* and *T. californicum*, was occupied at the time of listing, and is currently occupied. Occupancy status was determined using occurrence data from the SBNF (SBNF 2000, pp. 5–137; SBNF 2002a, pp. 1–133; SBNF GIS database), the CNDDB (2005a, pp. 1–21; 2005b, pp. 1–39), and the Rancho Santa Ana Botanical Gardens (Denslow *et al.* 2002, pp. 12 and 13). We determined occupancy at the time of listing by comparing survey and collection information to descriptions of occupied areas in the final listing rule published in the **Federal Register** on September 14, 1998 (63 FR 49006). Using the occurrence data listed above, we identified montane meadows that were occupied by one or both species. Areas containing a large number of individual plants (relative to all known occupied locations) recorded within at least 2 years of listing were considered to be occupied at the time of listing as the presence of a large number of individual plants within an area indicates that such area has likely been occupied for more than 2 years. Although occupied, we did not consider any meadows containing 10 or fewer reported individuals of either species for critical habitat, as these populations are likely to become extirpated and we believe these populations are not likely to contribute to the long-term conservation of either species.

Subsequently, we used the following rule set to identify areas for inclusion in the final critical habitat designation for each species: (1) we identified meadows with populations of 10 plants or greater (as discussed above) and delineated the meadow habitat using the USFS-modeled potential habitat specific to each species (Volgarino *et al.* 2000a, pp. 1–2; 2000b, pp. 1–2) and aerial or satellite imagery; (2) we delineated the meadow areas that appeared to appropriately capture features essential to the conservation of each species (PCEs); (3) we limited the delineation of critical habitat for each unit to areas within 328 ft (100 meters) of the occupied meadow habitat, a distance viewed as the limit for short-distance, wind-driven dispersal of seeds in *Taraxacum* spp. (Tackenberg *et al.* 2003, p. 451), and a likely distance for potential dispersal distance for *Poa atropurpurea*; and (4) as a final step, we removed any meadow habitat that was developed or degraded that is not likely to contain PCEs, or elements of them, to ensure critical habitat contains features essential to the conservation of each of the species.

Although we are not designating all known occurrences of either of these two plants, we believe that our criteria, and therefore the designations, are adequate to ensure the conservation of both species throughout their extant ranges and the essential features of their habitat, based on the best available information at this time. Species and plant communities that are protected across their ranges are expected to have lower likelihoods of extinction (Soulé and Simberloff 1986, pp. 32–35; Scott *et al.* 2001, pp. 1297–1300); our criteria identified multiple locations across the entire range of each species as essential habitat to prevent range collapse. Genetic variation in plants can result from the effects of population isolation and adaptation to locally distinct environments (Lesica and Allendorf 1995, pp. 754–757; Fraser 2000, pp. 49–51; Hamrick and Godt, pp. 291–295). Our critical habitat contains areas that represent the biogeographical diversity for each of these species. For *Poa atropurpurea*, we captured habitat in the northern portion of the species range, where the species occurs at high altitudes, and at the southern portion of the species range, where the species occurs at lower altitudes. For *Taraxacum californicum*, we captured areas that represent the entire range of this species. We included areas specifically in Big Bear Valley because this location is believed to be the historic core area for both of these species (Soreng 2007, p. 1–2). The areas we included represent the largest populations that still occur for these two species. We did not include areas where we do not have data on occupancy or where populations smaller than 10 plants occur.

When determining critical habitat boundaries for each species within this final rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PCEs for *Poa atropurpurea* and *Taraxacum californicum*. The scale of maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in this rule and are not designated as critical habitat. Therefore, Federal actions involving these textually excluded lands would not trigger section 7 consultations, with respect to critical habitat and the requirement of no adverse modification, unless the specific action may affect the primary constituent elements in adjacent critical habitat.

**Final Critical Habitat Designations**

We are designating approximately 2,489 ac (1,009 ha) of critical habitat for *Poa atropurpurea* in 8 units (see Table 1 below) and approximately 1,914 ac (775 ha) of critical habitat for *Taraxacum californicum* in 11 units (see Table 2 below). Five of these units overlap and are designated as critical habitat for both species (Units 2, 3, 4, 5, and 11; see Table 3 and unit descriptions below). The critical habitat areas described below constitute our best current assessment of areas that meet the definition of critical habitat for *P. atropurpurea* and *T. californicum*. We determined that all areas designated as critical habitat for *P. atropurpurea* and *T. californicum* were occupied at the time of listing and are currently occupied.

TABLE 1—CRITICAL HABITAT UNITS EXCLUDED AND DESIGNATED FOR *Poa atropurpurea*. (AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES.)

| Critical Habitat Unit | Land Ownership [1] | Area Excluded (Acres (Hectares)) | Area Designated (Acres (Hectares)) |
|---|---|---|---|
| 1 Pan Hot Springs Meadow | SBNF<br>Private (BBCCSD, others) | 0 (0)<br>40 (16) | 0 (0)<br>0 (0) |
| 2 North Baldwin Meadow | SBNF<br>CDFG<br>Private | 0 (0)<br>0 (0)<br>0 (0) | 79 (33)<br>98 (40)<br>1 (<1) |
| 3 Belleville Meadow | SBNF<br>Private (LSA) | 0 (0)<br>0 (0) | 409 (166)<br>5 (2) |
| 4 Hitchcock Meadow | SBNF<br>Private (BSA, others) | 0 (0)<br>0 (0) | 166 (67)<br>330 (134) |
| 5 Bluff Meadow | SBNF<br>Private (WC) | 0 (0)<br>0 (0) | 135 (55)<br>70 (28) |
| 11 Cienega Seca Meadow | SBNF<br>Private (LACEF) | 0 (0)<br>0 (0) | 15 (6)<br>66 (27) |
| 13 Mendenhall Valley | CNF<br>Private | 0 (0)<br>0 (0) | 160 (65)<br>131 (53) |
| 14 Laguna Meadow | CNF | 0 (0) | 788 (319) |
| 15 Bear Valley | CNF | 0 (0) | 36 (15) |
| Total area (acres (hectares)) [2] | | 40 (16) | 2,489 (1,009) |

[1] BBCCSD = Big Bear City Community Services District, BSA = Boy Scouts of America, CDFG = California Department of Fish and Game, CNF = U.S. Forest Service (lands in the Cleveland National Forest), LACEF = Los Angeles County Education Foundation, LSA = Lithuanian Scouts Association, SBNF = U.S. Forest Service (lands in the San Bernardino National Forest), WC = Wildlands Conservancy.
[2] Values may not sum exactly due to rounding.

TABLE 2—CRITICAL HABITAT UNITS EXCLUDED AND DESIGNATED FOR *Taraxacum californicum*. (AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES.)

| Critical Habitat Unit | Land Ownership[1] | Area Excluded (Acres (Hectares)) | Area Designated (Acres (Hectares)) |
|---|---|---|---|
| 1 Pan Hot Springs Meadow | SBNF<br>Private (BBCCSD, others) | 0 (0)<br>40 (16) | 0 (0)<br>0 (0) |
| 2 North Baldwin Meadow | SBNF<br>CDFG<br>Private | 0 (0)<br>0 (0)<br>0 (0) | 79 (33)<br>98 (40)<br>1 (<1) |
| 3 Belleville Meadow | SBNF<br>Private (LSA) | 0 (0)<br>0 (0) | 409 (166)<br>5 (2) |
| 4 Hitchcock Meadow | SBNF<br>Private (BSA, others) | 0 (0)<br>0 (0) | 166 (67)<br>330 (134) |
| 5 Bluff Meadow | SBNF<br>Private (WC) | 0 (0)<br>0 (0) | 135 (55)<br>70 (28) |
| 6 North Shay Meadow | SBNF | 0 (0) | 21 (8) |
| 7 Horse Meadow | SBNF | 0 (0) | 74 (30) |
| 8 Fish Creek Meadow | SBNF | 0 (0) | 89 (36) |
| 9 Broom Flat Meadow | SBNF | 0 (0) | 188 (76) |
| 10 Wildhorse Meadow | SBNF | 0 (0) | 52 (21) |
| 11 Cienega Seca Meadow | SBNF<br>Private (LACEF) | 0 (0)<br>0 (0) | 15 (6)<br>66 (27) |

TABLE 2—CRITICAL HABITAT UNITS EXCLUDED AND DESIGNATED FOR *Taraxacum californicum*. (AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES.)—Continued

| Critical Habitat Unit | Land Ownership[1] | Area Excluded (Acres (Hectares)) | Area Designated (Acres (Hectares)) |
|---|---|---|---|
| 12 South Fork Meadow | SBNF | 0 (0) | 116 (47) |
| Total area (acres (hectares)) [2] | | 40 (16) | 1,914 (775) |

[1] BSA = Boy Scouts of America, CDFG = California Department of Fish and Game, LACEF = Los Angeles County Education Foundation, LSA = Lithuanian Scouts Association, SBNF = U.S. Forest Service (lands in the SBNF), WC = Wildlands Conservancy.
[2] Values may not sum exactly due to rounding.

TABLE 3—LIST OF CRITICAL HABITAT UNITS AND THE SPECIES FOR WHICH EACH UNIT IS DESIGNATED AND THE SIZE OF EACH CRITICAL HABITAT UNIT.

| Critical Habitat Unit | *Poa atropurpurea* | *Taraxacum californicum* | Acres (Hectares) |
|---|---|---|---|
| 2 North Baldwin Meadow | X | X | 177 (72) |
| 3 Belleville Meadow | X | X | 414 (168) |
| 4 Hitchcock Meadow | X | X | 497 (201) |
| 5 Bluff Meadow | X | X | 205 (83) |
| 6 North Shay Meadow | | X | 21 (8) |
| 7 Horse Meadow | | X | 74 (30) |
| 8 Fish Creek Meadow | | X | 89 (36) |
| 9 Broom Flat Meadow | | X | 188 (76) |
| 10 Wildhorse Meadow | | X | 52 (21) |
| 11 Cienega Seca Meadow | X | X | 81 (33) |
| 12 South Fork Meadow | | X | 116 (47) |
| 13 Mendenhall Valley | X | | 291 (118) |
| 14 Laguna Meadow | X | | 788 (319) |
| 15 Bear Valley | X | | 36 (15) |
| Total area (acres (hectares)) [1] | 2,489 (1,009) | 1,914 (775) | 3,029 (1,226) |

[1] Values may not sum exactly due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for *Poa atropurpurea* and or *Taraxacum californicum*, below. The PCEs for these two species and their occupancy patterns may not always overlap. For example, steeper slopes near a watercourse at the center of a meadow are more likely to support *T. californicum*. However, such micro-habitat components cannot be differentiated within a meadow based on information we have available for unit mapping. If critical habitat for these two species was designated separately, the units for each species would be mapped the same. Therefore, the boundaries for Units 2, 3, 4, 5, and 11 are the same for both species, and these units are designated for each species individually (see Table 3).

*Unit 1: Pan Hot Springs Meadow*

We removed 102 ac (41 ha) from Unit 1 because we determined: (1) those areas consisted of upland habitat not containing the PCEs; and (2) those areas contained non-occupied habitat, a portion of which occurs outside of potential dispersal from occurrence locations (see ''Summary of Changes from Proposed Rule'' and ''Criteria Used to Identify Critical Habitat'' sections). We balanced the benefits of including the remaining portion of Unit 1 in the designation for each species against the benefits of excluding it under section 4(b)(2) of the Act and determined that the benefits of exclusion outweigh the benefits of inclusion. Therefore, we excluded the remainder of Unit 1 (40 ac (16 ha) from critical habitat (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

*Unit 2: North Baldwin Meadow*

We are designating Unit 2 as critical habitat for both *Poa atropurpurea* and *Taraxacum californicum*. Unit 2 consists of approximately 177 ac (72 ha) of non-degraded meadow occupied by both species at the time of listing; both species continue to occur within this unit. Unit 2 contains all of the features essential to the conservation of both species. It is located within the SBNF, on the north shore of Baldwin Lake, and northeast of Big Bear Lake. Approximately half of Unit 2 is federally owned and half is owned by CDFG.

Habitat in Unit 2 was historically impacted by authorized and unauthorized vehicle use, mining activity, residential development, and grazing by burros (CNDDB 2006a, p. 1; SBNF 2002a, p. 33; SBNF 2002b, p. 57).

The meadow is protected, but it is adjacent to State Route 18 and accessible to the public (SBNF 2000, p. 57). Disruption of the hydrologic regime by upstream development, trampling during illegal woodcutting, and quartzite theft activities were identified as past threats in this unit (CNDDB 2006b, p. 16). Additionally, *Poa atropurpurea* and *Taraxacum californicum* and their essential features are threatened in this unit by competition from invasion of nonnative, herbaceous annuals, and *T. officinale* has been reported to occur in this meadow (Krantz 2007, p. 2). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 2 due to the threats from upstream development, nonnative species invasion, hybridization, and human disturbance.

*Unit 3: Belleville Meadow*

We are designating Unit 3 as critical habitat for both *Poa atropurpurea* and *Taraxacum californicum*. Unit 3 consists of an approximately 414-ac (168-ha) meadow occupied by both species at the time of listing; both species continue to occur within this unit. Unit 3 (also referred to as Upper Holcomb Valley) contains all of the features essential to the conservation of both species. Although most individuals of *P. atropurpurea* observed were reported to be male, both sexes are present (SBNF 2000, p. 47). In 1999, the *T. californicum* population in Unit 3 was reported to be ''large'' and ''healthy'' with no apparent *T. officinale* hybrids (SBNF 2000, p. 56). Although no hybrid individuals are reported from this meadow, recent reports indicate that *T. officinale* is present at this location and the two species could hybridize (Krantz 2007, p. 2). Unit 3 is located within the SBNF, north of Big Bear Lake, and east of Hitchcock Meadow (Unit 4). The majority of lands within this unit are federally owned (409 ac (166 ha)), with only 5 ac (2 ha) of meadow habitat privately owned by the Lithuanian Scouts Association.

Meadow habitat in this Unit 3 may be impacted by recreational activities and nearby diffuse mining operations (CNDDB 2006a, p. 6; Eliason 2007b); and placement of USFS roads has resulted in habitat loss and effects to meadow hydrology. Several areas of Belleville Meadow are currently heavily utilized for dispersed recreation, including vehicle use along the classified roads through the site, hiking and mountain biking along the Gold Fever Trail, and use of Holcomb Valley Campground near the western portion of the meadow. Additionally, several mining claims also exist in the meadow. Unauthorized vehicle activity and mountain biking off of classified roads and trails have caused devegetation and alteration of surface hydrology in some areas (SBNF 2002a, p. 36). Finally, *Poa atropurpurea* and *Taraxacum californicum* and their physical and biological features are threatened in this unit by invasion of nonnative, herbaceous annuals, and *T. officinale* has been reported to occur in this meadow (Krantz 2007, p. 2).

The USFS erected signs and fencing and conducted outreach to protect occurrences in Unit 3 (SBNF 2002a, p. 37). For example, to reduce impacts to *Poa atropurpurea*, trails within Holcomb Valley Campground were disguised and rehabilitated, and the area was protected through barricading and signing (SBNF 2002a, p. 5). Nearby trails that did not pass through listed plant habitat were delineated and signed to encourage visitors to use those trails (SBNF 2002a, p. 5). However, special management considerations or protection may still be required to restore, protect, and maintain the essential features in Unit 3 due to the threats from human disturbance; current nearby mining activities; hybridization; and invasive, nonnative plant species.

*Unit 4: Hitchcock Meadow*

We are designating Unit 4 as critical habitat for both *Poa atropurpurea* and *Taraxacum californicum*. Unit 4 consists of an approximately 497-ac (201-ha) meadow occupied by both species at the time of listing; both species continue to occur within this unit. Although *T. officinale* is present, no apparent hybrids have been reported (SBNF 2000, p. 56). We do not have any information about the ratio of male to female *P. atropurpurea* plants in this meadow. Unit 4 contains all of the features essential to the conservation of both species and is located within the SBNF, north of Big Bear Lake, and west of Belleville Meadow (Unit 3). The majority of Unit 4 (also referred to as Holcomb Valley) is privately owned by the Boy Scouts of America (BSA) and used as a recreational and educational activity camp (BSA 2007, p. 1).

Unit 4 has been historically impacted by OHV use, horse grazing, and other human disturbance (CNDDB 2006b, p. 18). It is currently impacted by recreational and educational activities and horse grazing (SBNF 2000, p. 56; SBNF 2002a, p. 51). Additionally, *Poa atropurpurea* and *Taraxacum californicum* and their physical and biological features are threatened in this unit by invasion of nonnative, herbaceous annuals. Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 4 due to the threats from past human disturbance; current camp activities; and invasive, nonnative plant species.

*Unit 5: Bluff Meadow*

We are designating Unit 5 as critical habitat for both *Poa atropurpurea* and *Taraxacum californicum*. Unit 5 consists of an approximately 205-ac (83-ha) meadow occupied by both species at the time of listing; both species continue to occur within this unit. Although *T. officinale* is present, no hybrids are reported (SBNF 2000, p. 56). We do not have any information about the ratio of male to female *P. atropurpurea* plants in this meadow. Unit 5 contains all of the features essential to the conservation of both species. It is located within the SBNF, south of the west end of Big Bear Lake. The majority of Unit 5 is privately owned by the Wildlands Conservancy, and currently leased to the San Bernardino County Regional Parks Division as an outdoor science education camp (Wildlands Conservancy 2005).

Unit 5 has been historically impacted by recreational activities, cattle grazing, and other human disturbance (CNDDB 2006b, p. 12), although impacts are limited to recreational and educational activities (Eliason 2007b; SBNF 2000, p. 57; SBNF 2002a, p. 42). *Poa atropurpurea* and *Taraxacum californicum* and their physical and biological features are also threatened in this unit by invasion of nonnative, herbaceous annuals, including potential hybridization of *T. californicum* with *T. officinale* (SBNF 2000, p. 57; SBNF 2002a, p. 42). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 5 due to the potential impacts of past human disturbance; current camp activities; hybridization; and invasive, nonnative plant species.

*Unit 6: North Shay Meadow*

We are designating Unit 6 as critical habitat for *Taraxacum californicum* only. Unit 6 consists of an approximately 21-ac (8-ha) meadow occupied by the species at the time of listing; the species continues to occur within this unit. Although occupancy of Unit 6 was documented one year after listing, we consider Unit 6 to be occupied at the time of listing because it contains approximately 12 percent of the total number of individuals reported since 1999 and has the second highest

number of total individuals reported from any one unit, and therefore, we believe this area has been occupied for several years despite having been discovered in 1999 (see ''Criteria Used to Identify Critical Habitat'' section). Although *T. officinale* is present, no hybrids are reported (SBNF 2000, p. 56). This unit contains all of the features essential to the conservation of the species. It is located within the SBNF, east of Big Bear Lake, on the southern shore of Baldwin Lake, and north of Shay Road. The land in this unit is federally owned.

This northern portion of Shay Meadow has been isolated by development from the southern meadow adjacent to East Big Bear Boulevard. Lakeshore habitat within Unit 6 is currently impacted by recreational activities due to the use of trails connecting private land to the lakeshore for OHV use, hiking, mountain biking, and horseback riding (SBNF 2000, p. 57; SBNF 2002a, p. 23). Additionally, *Taraxacum californicum* and features essential to its conservation are threatened in this unit by invasion of nonnative, herbaceous annuals, including potential hybridization with *T. officinale* (CNDDB 2006b, p. 36; SBNF 2000, p. 57). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 6 due to the impacts of human disturbance; hybridization; and invasive, nonnative plant species.

*Unit 7: Horse Meadow*

We are designating Unit 7 as critical habitat for *Taraxacum californicum* only. Unit 7 consists of an approximately 74-ac (30-ha) meadow occupied by the species at the time of listing; the species continues to occur within this unit. Occupancy throughout the meadow was confirmed as recently as 2002 (Denslow *et al.* 2002, pp. 12 and 13). Although *T. officinale* is present, no hybrids have been reported (SBNF 2000, p. 56). Unit 7 contains all of the features essential to the conservation of the species. It is located within the SBNF, southwest of Big Bear Lake, and northwest of San Gorgonio Mountain. Unit 7 is federally owned and located in the San Gorgonio Wilderness Area of the SBNF.

Recreational impacts from foot-traffic are reported in Unit 7 (Denslow *et al.* 2002, pp. 12 and 13; CNDDB 2006b, p. 5; SBNF 2000, p. 57; SBNF 2002a, p. 54). Additionally, *Taraxacum californicum* and features essential to its conservation are threatened in this unit by invasion of nonnative, herbaceous annuals, including potential hybridization with *T. officinale* (SBNF 2000, p. 57). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 7 due to threats from human disturbance; hybridization; and invasive, nonnative plant species.

*Unit 8: Fish Creek Meadow*

We are designating Unit 8 as critical habitat for *Taraxacum californicum* only. Unit 8 consists of an approximately 89-ac (36-ha) meadow occupied by the species at the time of listing; the species continues to occur within this unit. Although *T. officinale* is present, no hybrids are reported (SBNF 2000, p. 56). Unit 8 contains all of the features essential to the conservation of the species. It is located within the SBNF, southwest of Big Bear Lake, and northeast of San Gorgonio Mountain. Unit 8 is federally owned and occurs within the San Gorgonio Wilderness Area of the SBNF.

Habitat conditions in Unit 8 are reported to be undisturbed, although diffuse recreational use impacts are likely due to trails around meadow in forested area (CNDDB 2006b, p. 6; SBNF 2002a, p. 52). Additionally, *Taraxacum californicum* and features essential to its conservation are threatened in this unit by invasion of nonnative, herbaceous annuals, including potential hybridization with *T. officinale* (SBNF 2000, p. 58). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 8 due to the threats from human disturbance; hybridization and invasive; nonnative plant species.

*Unit 9: Broom Flat Meadow*

We are designating Unit 9 as critical habitat for *Taraxacum californicum* only. Unit 9 consists of an approximately 188-ac (76-ha) meadow occupied by the species at the time of listing; the species continues to occur within this unit. Although *T. officinale* is present, no hybrids are reported (SBNF 2000, p. 56). Although occupancy of Unit 9 was documented 2 years after listing, we consider it to have been occupied at the time of listing because Unit 9 supports approximately 9 percent of the total number of T. californicum individuals reported since 1999, which is the fifth largest recorded population out of 35 and more than double the average recorded population size. This unit contains all of the features essential to the conservation of the species. Unit 9 is federally owned and located within the SBNF southeast of Big Bear Lake.

Unit 9 is historically impacted by OHV activity, cattle and burro grazing, and other human disturbance (CNDDB 2006b, p. 28; SBNF 2002b, p. 64). This unit and essential features therein are currently impacted by diffuse recreational activities and cattle grazing (SBNF 2000, p. 58; SBNF 2002a, p. 46) and by invading, nonnative, herbaceous annuals, including potential hybridization with *T. officinale* (CNDDB 2006b, p. 28; SBNF 2002a, p. 45). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 9 due to the potential impacts of human disturbance; hybridization; and invasive, nonnative plant species.

*Unit 10: Wildhorse Meadow*

We are designating Unit 10 as critical habitat for *Taraxacum californicum* only. Unit 10 consists of an approximately 52-ac (21-ha) meadow occupied by the species at the time of listing; the species continues to occur within this unit. Although *T. officinale* is present, no hybrids are reported (SBNF 2000, p. 56). Although occupancy of Unit 10 was documented 1 year after listing, we consider Unit 10 to have been occupied at the time of listing because Unit 10 has the highest number of total documented individuals since the time of listing among all the units (SBNF 2000, p. 56; CNDDB 2006b, pp. 30 and 31) and hosts approximately 20 percent of the total number of individuals reported since 1999, and therefore, we believe that this area was occupied for several years despite having been discovered in 1999 (see ''Criteria Used to Identify Critical Habitat'' section). Unit 10 was also reported to be occupied by *Poa atropurpurea* in 1981, although surveys in 1999 and 2000 did not locate any individuals (SBNF 2000, p. 47). Therefore, this unit is designated as critical habitat for T. *californicum* only. This unit contains all of the features essential to the conservation of the species. The land in this unit is federally owned and is located within the SBNF southeast of Big Bear Lake.

Habitat in Unit 10 is reported to be of ''excellent'' quality and well protected, although some diffuse recreation impacts have been reported (SBNF 2000, pp. 56 and 58; SBNF 2002a, p. 69). *Taraxacum californicum* and features essential to its conservation are threatened in this unit by invasion of nonnative, herbaceous annuals, including potential hybridization with *T. officinale* (CNDDB 2006b, p. 31; SBNF 2000, p. 56 and 58). Therefore, special management considerations or

protection may be required to restore, protect, and maintain the essential features in Unit 10 due to the potential impacts of invasive, nonnative plant species; hybridization; and diffuse recreation impacts.

*Unit 11: Cienega Seca Meadow*

We are designating Unit 11 as critical habitat for both *Poa atropurpurea* and *Taraxacum californicum*. Unit 11 consists of an approximately 81-ac (33-ha) meadow occupied by both species at the time of listing; both species continue to occur within this unit. Although *T. officinale* is present, no hybrids are reported (SBNF 2000, p. 56). We do not have any information about the ratio of male to female *P. atropurpurea* plants in this meadow. Unit 11 contains all of the features essential to the conservation of both species. It is located within the SBNF adjacent to State Route 38, southeast of Big Bear Lake, and northeast of San Gorgonio Mountain. The majority of Unit 11 (also referred to Blue Sky Meadow) is privately owned by the Los Angeles County Education Foundation (LACEF), and currently used as an outdoor science education camp (Wildlands Conservancy 2007; LACEF 2007).

Unit 11 has been historically impacted by changes in the hydrologic regime due to recreational activities, cattle grazing, and other human disturbance (CNDDB 2006a, p. 2, 2006b, p. 2). Water usage from a well and vehicle use on some access roads are current threats to meadow habitat (SBNF 2002a, p. 77). *Poa atropurpurea* and *Taraxacum californicum* and their essential features are also threatened in this unit by invasion of nonnative, herbaceous annuals, including potential hybridization of *T. californicum* with *T. officinale* (CNDDB 2006b, p. 2; SBNF 2000, p. 58). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 11 due to the threats from past human disturbance; current camp activities; hybridization; and invasive, nonnative plant species.

*Unit 12: South Fork Meadow*

We are designating Unit 12 as critical habitat for *Taraxacum californicum* only. Unit 12 consists of approximately 116-ac (47-ha) of meadows occupied by the species at the time of listing; the species continues to occur within this unit. Although *T. officinale* is present, no hybrids have been reported (SBNF 2000, p. 56). Unit 12 contains all of the features essential to the conservation of the species. It is located on Federal lands within the San Gorgonio Wilderness Area of SBNF, southwest of Big Bear Lake on the northern slope of San Gorgonio Mountain.

Habitat in Unit 12 is reported to be virtually undisturbed, but possibly impacted by irregular and recreational use (CNDDB 2006b, p. 1; Krantz 2007, p. 2; SBNF 2000, pp. 56 and 58). Threats include impacts of hikers, horseback riding, and camping; however, the meadows are minimally disturbed (SBNF 2002a, p. 66). Additionally, *Taraxacum californicum* and features essential to its conservation are threatened in this unit by invasion of nonnative, herbaceous annuals, including potential hybridization with *T. officinale* (SBNF 2000, pp. 56 and 58). Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 12 due to the threats from human disturbance; hybridization; and invasive, nonnative plant species.

*Unit 13: Mendenhall Valley*

We are designating Unit 13 as critical habitat for *Poa atropurpurea* only. Unit 13 consists of an approximately 291-ac (118-ha) meadow occupied by the species at the time of listing; the species continues to occur within this unit. This unit contains all of the features essential to the conservation of the species. It is located within the CNF on Palomar Mountain in San Diego County; 160 ac (65 ha) of the unit are federally owned, and the remaining portion (131 ac (53 ha)) is privately owned. We are not including a large portion of the meadow on the northwest end as critical habitat because a field survey determined that the habitat was degraded and of a different vegetative type (Anderson 2007, p. 1). The Mendenhall Valley meadow contains a geographically mid-range population of *P. atropurpurea*, separated from the southern populations in Laguna Meadow and Bear Valley by at least 36 miles (58 km), and separated from the northern populations in the Big Bear Lake area by at least 60 miles (109 km).

Habitat in Unit 13 has been impacted by cattle grazing (CNDDB 2006a, p. 4; CNF 1991, pp. 13-17), land-use changes, and recreational activities (2006 GIS satellite imagery). Under a biological opinion resulting from Service consultation with the CNF (Service 2001, p. 5), annual surveys are to be conducted in this unit for *Poa atropurpurea*, and cattle are to be excluded from grazing on CNF land until mature seed has developed (set seed) on *P. atropurpurea*. Annual phenology monitoring is currently being conducted to ensure that *P. atropurpurea* has set seed prior to the start of grazing, which generally is permitted after May 1 in Mendenhall Valley (Winter 2007, p. 1). The USFS has also conducted ongoing gully repair work in this unit to benefit endangered meadow plants (Winter 2007, p. 3). Finally, *P. atropurpurea* and features essential to its conservation are threatened in this unit by invasion of nonnative, herbaceous annuals. Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 13 due to threats from grazing and from invasive, nonnative plant species.

*Unit 14: Laguna Meadow*

We are designating Unit 14 as critical habitat for *Poa atropurpurea* only. Unit 14 consists of an approximately 788-ac (319-ha) meadow occupied by the species at the time of listing; the species continues to occur within this unit. Although all five herbarium specimens collected in this unit and reviewed by Curto (1992, p. 3) were female (one from 1978, three from 1981, and one from 1991), Hirshberg (1994, p. 2) reported a 1:250 female to male ratio during field surveys. This unit contains all of the features essential to the conservation of the species. It is located on federally owned lands on Laguna Mountain within the CNF in San Diego County.

Habitat in Unit 14 has been impacted by grazing and recreational activities (CNF 1991, pp. 13-17; CNDDB 2006a, pp. 4 and 20). Under a biological opinion resulting from Service consultation with the CNF (Service 2001, p. 5), annual surveys are to be conducted in this unit for *Poa atropurpurea*, and cattle are to be excluded from grazing until completion of seed set is documented. The CNF does not permit grazing activities in Laguna Meadow until July 1; however, no annual surveys are currently being conducted because the grazing in this meadow starts several months after seed set occurs (Winter 2007, p. 1). Additionally, *P. atropurpurea* and features essential to its conservation are threatened in this unit by invasion of nonnative, herbaceous annuals. Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 14 due to the threats from grazing and from invasive, nonnative plant species.

*Unit 15: Bear Valley*

We are designating Unit 15 as critical habitat for *Poa atropurpurea* only. Unit 15 consists of an approximately 36-ac (15-ha) meadow occupied by the species

at the time of listing; the species continues to occur within this unit. We do not have any information about the ratio of male to female *P. atropurpurea* plants in this meadow. This unit contains all of the features essential to the conservation of the species. Unit 15 is federally owned and located within the CNF southwest of Laguna Mountain and south of the town of Pine Valley, San Diego County.

Habitat in Unit 15 has been impacted by cattle grazing (CNDDB 2006a, p. 21) and scattered irregular and diffuse recreational activities (2006 GIS satellite imagery). Under a biological opinion resulting from Service consultation with the CNF (Service 2001, pp. 3 and 4), annual surveys would be conducted in this unit for *Poa atropurpurea*, and cattle are to be excluded from grazing until mature seed has developed on *P. atropurpurea*. The CNF does not permit grazing activities in Bear Valley until August 1; however, no annual surveys are currently being conducted because the grazing in this meadow starts several months after seed set occurs in late April (Winter 2007, p. 1). Poa atropurpurea and features essential to its conservation are also threatened in this unit by invasion of nonnative, herbaceous annuals. Therefore, special management considerations or protection may be required to restore, protect, and maintain the essential features in Unit 15 due to the threats from grazing; human disturbance associated with recreation; and invasive, nonnative plant species.

**Effects of Critical Habitat Designation**

*Section 7 Consultation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect *Poa atropurpurea*, *Taraxacum californicum*, or the designated critical habitat for either of these two species will require section 7(a)(2) consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are examples of agency actions are subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

*Application of the ''Adverse Modification'' Standard*

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F. 3d 1059 (9th Cir. 2004) and Sierra Club v. U.S. Fish and Wildlife Service *et al.*, 245 F.3d 434, 442F (5th Cir 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, the key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter PCEs to an extent that appreciably reduces the conservation value of critical habitat for *Poa atropurpurea* or *Taraxacum californicum*. Generally, the conservation role of the critical habitat units designated for these species is to support native occurrences of *P. atropurpurea* and *T. californicum* that comprise viable core area populations.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for *Poa atropurpurea* or *Taraxacum californicum* include, but are not limited to (please see the ''Special Management Considerations or Protection'' section for a more detailed discussion on the impacts of these actions to the listed species):

(1) Actions that result in ground disturbance to meadows. Such activities could include (but are not limited to) residential or recreational development, OHV activity, dispersed recreation, new road construction or widening, existing road maintenance, and grazing. These activities could cause direct mortality of *Poa atropurpurea* or *Taraxacum californicum* and impact meadows by damaging or eliminating habitat, altering soil composition due to

increased erosion, and increasing densities of nonnative plant species. Additionally, changes in soil composition may lead to cascading changes in the vegetation composition, such as growth of shrub cover that decreases density of or eliminates *P. atropurpurea* or *T. californicum*.

(2) Actions that result in alteration of the hydrological regime of the wet meadow habitat. Such activities could include residential or recreational development adjacent to meadows, OHV activity, dispersed recreation, new road construction or widening, and existing road maintenance. These activities could alter surface layers and hydrological regime in a manner that promotes loss of soil matrix components and moisture necessary to support the growth and reproduction of *Poa atropurpurea* or *Taraxacum californicum*.

(3) Actions that would disturb the existing vegetation communities within the meadow habitat prior to annual pollination and seed set (reproduction). Such activities could include (but are not limited to) grazing, mowing, grading, or discing habitat in the spring and early summer months. These activities could alter the habitat for *Poa atropurpurea* and *Taraxacum californicum* and result in decreased reproduction.

**Exclusions**

*Application of Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that the Secretary shall designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In the following sections, we address a number of general issues that are relevant to the exclusions we considered.

Additionally, we conducted an economic analysis of the impacts of the proposed critical habitat designations and related factors (referred to here as the draft EA). The draft EA (April 9, 2008) was made available for public review and comment from April 16, 2008, to May 16, 2008 (73 FR 20600). The draft EA was finalized to incorporate the revisions made to the proposed critical habitat designations (see ''Summary of Changes from the Proposed Rule'' section). Based on the draft EA, the proposed critical habitat designations, and the information in this final rule, we excluded the area within Unit 1 (as defined in this final rule) from the critical habitat designations under the provisions of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

*Benefits of Designating Critical Habitat*

The process of designating critical habitat as described in the Act requires that the Service identify those lands on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of the species. In identifying those lands, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the time of designation, the habitat that is identified, if managed, could provide for the survival and recovery of the species.

The designation of critical habitat can be beneficial because it identifies lands to be managed for the recovery of a species. The process of proposing and finalizing a critical habitat rule provides the Service with the opportunity to determine the physical or biological features essential to the conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine other areas essential for the conservation of the species. The designation process includes peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat.

The consultation provisions under section 7(a)(2) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with us on actions that may affect a listed species and must refrain from undertaking actions that are likely to jeopardize the continued existence of the species. Thus, the analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on the species. However, the regulatory standard is different: the jeopardy analysis looks at the action's impact on survival and recovery of the species, while the adverse modification analysis looks at the action's effects on the designated habitat's contribution to the species' conservation. This will, in many instances, lead to different results and different regulatory requirements.

There are two limitations to the regulatory effect of critical habitat. First, a consultation is required only where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency), if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, the designation only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that the conservation role and function of those areas that contain the physical and biological features essential to the conservation of the species or of unoccupied areas that are essential for the conservation of the species are not appreciably reduced. Critical habitat designation alone, however, does not require property owners to undertake affirmative actions to promote the recovery of the species.

Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when we concur in writing that the proposed Federal action is not likely to adversely affect critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then we would initiate formal consultation, which would conclude when we issue a biological opinion on whether the proposed Federal action is likely to result in destruction or adverse modification of critical habitat.

For critical habitat, a biological opinion that reaches a ''no destruction or adverse modification'' determination may contain discretionary conservation recommendations to minimize adverse

effects to primary constituent elements, but it would not suggest the implementation of any reasonable and prudent alternative. We suggest reasonable and prudent alternatives to the proposed Federal action only when our biological opinion results in an adverse modification conclusion.

As stated above, the designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation has been initiated under section 7(a)(2) of the Act, the purpose of consultation is to avoid jeopardy to the species and adverse modification of its critical habitat, but not specifically to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans generally institute proactive actions to remove or reduce known threats to a species or its habitat. We believe that in many instances the benefit to a species or its habitat realized through the designation of critical habitat is low when compared to the conservation benefit that can be achieved through voluntary conservation efforts or management plans. The conservation achieved through implementing HCPs or other habitat management plans can be greater than what we achieve through multiple site-by-site, project-by-project, section 7(a)(2) consultations involving consideration of critical habitat. Management plans may commit resources to implement long-term management and protection to particular habitat for at least one and possibly additional listed or sensitive species. Section 7(a)(2) consultations commit Federal agencies to preventing adverse modification of critical habitat caused by the proposed action only, and not to providing conservation or long-term benefits to areas not affected by the proposed action. Thus, implementation of any HCP or management plan that considers enhancement or recovery as the management standard may often provide as much or more benefit than a consultation for critical habitat designation.

Another benefit of including lands in critical habitat is that designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas ofhigh conservation value for the listed species. In general, critical habitat designation always has educational benefits; however, in some cases, they may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefits of a critical habitat designation. Including lands in critical habitat also would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

**Conservation Partnerships on Non-Federal Lands**

Most federally listed species in the United States will not recover without cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998; Crouse *et al.* 2002; James 2002). Building partnerships and promoting voluntary cooperation of landowners are essential to our understanding the status of species on non-Federal lands, and necessary for us to implement recovery actions such as reintroducing listed species and restoring and protecting habitat.

Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (HCPs, safe harbor agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on the view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (61 FR 63854; December 2, 1996).

Many private landowners, however, are wary of the possible consequences of attracting endangered species to their property. Mounting evidence suggests that some regulatory actions by the Federal government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This perception results in anti-conservation incentives, because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999; Brook *et al.* 2003).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002). We believe that the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation in those areas.

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus the benefits of excluding areas that are covered by effective partnerships or other voluntary conservation commitments can often be high.

**Benefits of Excluding Lands With HCPs or Other Approved Management Plans**

The benefits of excluding lands with HCPs or other approved long-term management plans from critical habitat

designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many conservation plans provide conservation benefits to unlisted sensitive species as well as to listed species. Imposing an additional regulatory review as a result of the designation of critical habitat may undermine conservation efforts and discourage partnerships in many areas. Designation of critical habitat within the boundaries of management plans that provide conservation measures for a species could be viewed as a disincentive to entities currently developing these plans or contemplating them in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species will be affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning.

A related benefit of excluding lands within approved HCPs and management plans from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. Designating lands within approved management plan areas as critical habitat (such as the HMP as described in the ''Summary of Changes From Proposed Rule'' section) would likely have a negative effect on our ability to establish new partnerships to develop these plans, particularly plans that address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, both HCPs and Natural Communities Conservation Plan (NCCP)-HCP applications require consultation, which would review the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), even without the critical habitat designation. In addition, all other Federal actions that may affect the listed species would still require consultation under section 7(a)(2) of the Act, and we would review these actions for possibly significant habitat modification in accordance with the definition of harm referenced above.

The information provided in the previous section applies to all the following discussions of benefits of inclusion or exclusion of critical habitat.

**Economic Analysis**

Following the publication of the proposed critical habitat designations, we conducted an economic analysis to estimate the potential economic effect of the designations. The draft analysis (dated April 9, 2008) was made available for public review on April 16, 2008 (73 FR 20600). We accepted comments on the draft analysis until May 16, 2008. The final analysis (final EA) of the potential economic effects of the designations was developed by considering the public comments and the revisions to the proposed critical habitat designations (see ''Summary of Changes from the Proposed Rule'' section).

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum*. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. The analysis looks retrospectively at baseline impacts incurred since the species were listed (63 FR 49006, September 14, 1998), and forecasts both baseline and incremental impacts likely to occur after the designation of critical habitat. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designations might unduly burden a particular group or economic sector.

The economic analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The economic analysis examines activities taking place both within and adjacent to the designations. It estimates impacts based on activities that are ''reasonably foreseeable'' including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Accordingly, the analysis bases estimates on activities that are likely to occur within a 20–year time frame, from when the proposed rule became available to the public (August 7, 2007, 72 FR 44232). The 20–year time frame was chosen for the analysis because, as the time horizon for an economic analysis is expanded, the assumptions on which the projected number of projects and cost impacts associated with those projects become increasingly speculative.

Based on our analysis, we concluded that the designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* would not result in significant economic impacts. The total future potential economic impact is estimated to be $129,000 to $4.3 million ($11,000 to $403,000 annualized) over the next 20 years in present value terms applying a 7 percent discount rate. The present value of these impacts, applying a 3 percent discount rate, is $135,000 to $5.0 million ($9,000 to $336,000 annualized). Impacts associated with recreation represent the largest proportion of post-designation incremental impacts (solely attributable to the designations of critical habitat), accounting for over 86 percent of forecast incremental impacts in the areas being designated as critical habitat when a 7 percent discount rate is used. Transportation-related incremental impacts account for approximately 14 percent of forecast incremental impacts when a 7 percent discount rate is used. The BBCCSD is expected to account for over 86 percent of the total anticipated upper-bound incremental impacts, while Caltrans is forecast to bear approximately 14 percent of these impacts when a 7 percent discount rate is used. The remaining incremental impacts are shared between the USFS, the Federal Highway Administration), and the Service, in order of magnitude. Unit 1, Pan Hot Springs Meadow, primarily owned by Big Bear City Community Services District (BBCCSD), is anticipated to account for approximately 88 percent of total upper-bound incremental impacts of the designation for both species, followed by Unit 2 bearing almost 12 percent of these impacts when a 7 percent discount rate is used. We have excluded Unit 1, the unit with a disproportionate amount of the possible economic impacts; therefore, we do not find the economic costs to be significant as they relate to the designated critical habitat

(see ''Exclusions Under Section 4(b)(2) of the Act'' section).

The final economic analysis is available at *http://www.regulations.gov* and *http://www.fws.gov/carlsbad* or upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

*Areas Considered for Exclusion Under Section 4(b)(2) of the Act*

At the request of the USFS, we evaluated the appropriateness of excluding Forest Service lands from the final designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* under section 4(b)(2) of the Act based on management provided for federally listed species, including *P. atropurpurea* and *T. californicum*, under the USFS Land Management Plan and associated 2002 Meadow Habitat Management Guide (SBNF 2002a), and the 1991 Habitat Management Guide for the Sensitive Plant Species in Riparian Montane Meadows (CNF 1991). As indicated in our response to Comment 14 in the ''Public Comments'' section above, we have concluded based on the record before us not to exclude the Forest Service lands in this instance. Therefore, as previously discussed, we are designating approximately 1,788 ac (724 ha) of Forest Service lands in Units 2, 3, 4, 5, 11, 13, 14, and 15 as critical habitat for *P. atropurpurea* and 1,344 ac (544 ha) of Forest Service lands in Units 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 as critical habitat for *T. californicum*.

*Exclusions Under Section 4(b)(2) of the Act*

We have considered and are excluding approximately 40 ac (16 ha) of non-Federal lands in Unit 1 (Pan Hot Springs) that are owned by the BBCCSD and the adjacent Pan Hot Spring landowner from the critical habitat designations for *Poa atropurpurea* and *Taraxacum californicum* under section 4(b)(2) of the Act. A detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act is provided in the paragraphs below.

*Benefits of Inclusion—Pan Hot Springs Meadow*

The inclusion of the approximately 40 ac (16 ha) of Unit 1 could be beneficial because it identifies lands to be managed for the recovery of the two species. As discussed previously in this rule, the process of proposing and finalizing a critical habitat designation is valuable to landowners and managers for use in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat. However, plant conservation efforts with the landowners in Unit 1 have already been ongoing for many years before the critical habitat was proposed. The BBCCSD has been actively involved in listed plant conservation.

The educational benefits of designation are small and largely redundant to those derived through conservation efforts currently being planned and implemented in Unit 1. The process of developing the HMP has involved several partners including the public and local government representatives, the University of Redlands, the San Manuel Band of Serrano Mission Indians, Federal agencies, and private landowners. Additionally, the HMP includes implementation of an environmental education program to promote public understanding and appreciation of the natural and cultural resources in Pan Hot Springs Meadow. Therefore, the educational benefits of designating the private lands in Unit 1 (Pan Hot Springs Meadow) as critical habitat are minimal.

The consultation provisions under section 7(a)(2) of the Act constitute the regulatory benefits of inclusion for critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. However, the 40 ac (16 ha) being excluded are on private property, with no expected Federal nexus for activities that may affect *Poa atropurpurea* and *Taraxacum californicum*. Therefore, including this area in the critical habitat designations is unlikely to result in any benefits to the species that may be derived through consultation under section 7(a)(2) of the Act.

*Benefits of Exclusion—Pan Hot Springs Meadow*

The BBCCSD has worked cooperatively as a partner with the Service for more than 18 years. In 1990, the BBCCSD worked with the Service and California Department of Fish and Game (CDFG) to plan and place an approximate 10-ac (4-ha) deed restriction over part of their property in Pan Hot Springs Meadow to protect federally listed plants. In January 2008, BBCCSD and the adjacent private landowner, who owns less than 1 ac (<1 ha) within Unit 1 and the water rights to the Pan Hot Springs, one of the hydrological features of the meadow, approached us with the idea of creating a partnership to conserve the sensitive areas of Pan Hot Springs Meadow and to expand the plant conservation area to include areas that meet the definition of critical habitat for *Poa atropurpurea* and *Taraxacum californicum*. Further, the BBCCSD asked for our help in developing a habitat management plan to manage its lands in Pan Hot Springs Meadow for listed plant conservation, including the approximate 10-ac (4-ha) area previously conserved.

The HMP covers approximately 135 ac (55 ha) of land within the Pan Hot Springs Meadow at the southwest shore of Baldwin Lake (Krantz 2008b, p. 3). The HMP describes the BBCCSD commitment to conserve approximately 40 ac (16 ha) of sensitive habitat and focuses on active management and conservation in perpetuity of this habitat, including specific measures for habitat restoration and monitoring (for example, nonnative weed control, restoration and enhancement of ponds) for four federally listed endangered plants (*P. atropurpurea*, *T. californicum*, *Sidalcea pedata* (pedate checker-mallow), and *Thelypodium stenopetalum* (slender-petaled mustard)) and one federally listed threatened plant (*Castilleja cinerea* (ash-gray Indian paintbrush)). The HMP was adopted by the BBCCSD Board of Directors on July 7, 2008, and as it is implemented, will provide substantial benefits to the species.

Under the HMP, the 40-ac (16-ha) owned by BBCCSD will be protected by a restrictive covenant (similar to a conservation easement). The specific management responsibilities for *Poa atropurpurea* and *Taraxacum californicum* outlined in the HMP provide assurance to us that the features essential to the conservation of these two species will be maintained in the quantity and spatial distribution needed for the conservation of *P. atropurpurea* and *T. californicum* in perpetuity. The HMP and commitment by the BBCCSD includes plans to fund an endowment for the long-term management, monitoring, and conservation of the area in perpetuity. The expenditure of $25,000 for initial management of this area under the HMP is already funded in BBCCSD's 2008-2009 budget. The BBCCSD has also spent approximately $10,000 to hire a species expert as a consultant and draft the HMP. These are sizeable expenditures for a small government and show their good faith in the conservation of *Poa atropurpurea* and *Taraxacum californicum*. Their previous conservation actions include: placing a deed restriction over 10 ac (4 ha) of their lands; limiting grazing on their lands; conducting extensive plant surveys throughout their property at Pan Hot Springs Meadow; drafting the HMP and revising the HMP per Service

comments, addressing the management of all five federally listed species on their property within the HMP; meeting and partnering with the adjacent private landowner who owns the water rights to Pan Hot Spring; and meeting with the San Manuel Band of Serrano Mission Indians to identify and address their cultural interest in the area. All of these actions support their commitment to conserving *P. atropurpurea* and *T. californicum*.

The creation and implementation of the HMP brought together multiple stakeholders in a partnership to conserve the unique cultural, biological, and hydrological aspects of Pan Hot Springs Meadow. This partnership was initiated by the BBCCSD and includes other private landowners in the area as well as the San Manuel Band of Serrano Mission Indians, the USFS, the CDFG, and the Service. This partnership is important for the successful management of this meadow. Survey efforts conducted by species experts demonstrate that all known occurrences of *Poa atropurpurea* and *Taraxacum californicum* within the Pan Hot Springs Meadow are limited to the approximately 40 ac (16 ha) identified as Unit 1. The HMP addresses the need for baseline surveys of the meadow and restoration activities that are necessary to support the long-term preservation of this meadow. The HMP outlines management activities to address the four main threats to the features essential to the conservation of *P. atropurpurea* and *T. californicum*: development activities, livestock grazing, introduced species, and hydrological alteration. The HMP also includes an environmental education program to promote public understanding and appreciation of the natural and cultural resources in Pan Hot Springs Meadow. Finally, the HMP includes an implementation schedule, funding plan, and an advisory team (with Service participation) that will further develop measurable management objectives that assure the success of this plan.

We have also identified economic impacts to the BBCCSD that could result from the designations. The final economic analysis estimates that over the next 20 years, the critical habitat designations could affect up to 2.9 percent of BBCCSD's current budget (Appendix B, table B-1 of the Economic Analysis). This upper bound could be considered a significant impact to a small entity under the Small Business Regulatory Enforcement Fairness Act. The economic analysis also estimates that a disproportionate impact, 88 percent of the total anticipated upper-bound incremental impacts at 7 percent discounted rate, will be attributed to Unit 1; BBCCSD is expected to account for over 86 percent of the total anticipated upper-bound incremental impacts. Excluding Unit 1 from the critical habitat designations would remove these disproportionate and potentially significant economic impacts to the BBCCSD and is a further benefit of exclusion.

*Benefits of Exclusion Outweigh the Benefits of Inclusion*

The educational benefits of designation are small and largely redundant to those derived through conservation efforts underway, which include the implementation of the HMP. The regulatory benefits of designating the private lands in Unit 1 (Pan Hot Springs Meadow) as critical habitat are minimal, as a Federal nexus for activities that may occur within Unit 1 are unlikely, and critical habitat designation on these lands may actually impede the conservation of this unique and sensitive habitat. Thus, we believe the implementation of the HMP and the continuing conservation partnership with the landowners within Unit 1 will provide more conservation benefit to the species than any benefits the species may receive as a result of consultation under section 7(a)(2) of the Act conducted under the standards required by the Ninth Circuit Court of Appeals in the Gifford Pinchot decision.

The exclusion of the private lands in Pan Hot Springs Meadow will help us to strengthen and preserve the partnerships created with the stakeholders and neighboring private landowners involved in the creation and implementation of the HMP. As described above in the ''Conservation Partnerships on Non-Federal Lands'' section and as specifically noted by the BBCCSD and the adjacent private landowner in their comments on the proposed rule, designation of critical habitat on these lands may impede our partnership with the BBCCSD and private landowners in Unit 1 and may act as a disincentive for other private landowners to partner with us on conservation partnerships in the future. In contrast to the minimal regulatory benefits of inclusion, these voluntary commitments to implement conservation projects to protect and manage these species' habitat (for example, removal of nonnative, invasive plants) will result in substantial conservation benefits for *Poa atropurpurea* and *Taraxacum californicum*. A significant amount of effort has been exhibited by the BBCCSD (the owner of the majority of land in this area) regarding the creation of the HMP. Under the HMP, no projects that would damage the sensitive habitat or hydrology within Pan Hot Springs Meadow would be allowed by the BBCCSD (Krantz 2008b, p. 10). Excluding Pan Hot Springs Meadow from the final designations sends a clear signal to the private landowners in Unit 1 that the Service actively recognizes and supports their sustained commitment to restore and protect the sensitive habitat in this area. We will continue working in partnership with these landowners to implement the HMP and other conservation actions in this area.

The economic analysis estimates that over the next 20 years, the critical habitat designations could affect up to 2.9 percent of BBCCSD's current budget (Appendix B, table B-1 of the Economic Analysis). The economic analysis also estimates that a disproportionate impact, 88 percent of the total anticipated upper-bound incremental impacts at 7 percent discounted rate, will be attributed to Unit 1; impacts to BBCCSD are expected to account for over 86 percent of the total anticipated upper-bound incremental impacts. Excluding Unit 1 from the critical habitat designations would remove these disproportionate and potentially significant economic impacts to the BBCCSD and is a further benefit of exclusion.

We reviewed and evaluated the proposed delineation of essential habitat in the Pan Hot Springs Meadow and have determined that the significant partnership and economic benefits of excluding these 40 ac (16 ha) of lands in Unit 1 as identified in this section and above under the ''Economic Analysis'' section outweigh the minor benefits of designating these lands as critical habitat. Therefore, we are excluding Unit 1 from the designations of critical habitat based on: (1) long-term conservation benefits for *Poa atropurpurea* and *Taraxacum californicum* due to the approval and implementation of the HMP; (2) new partnership opportunities resulting in greater conservation for these species and other listed plan species and features essential to their conservation; (3) future educational opportunities at this site as provided for in the HMP; and (4) removal of the disproportionate and potentially significant costs to the BBCCSD attributable to the designation of critical habitat.

*Exclusion Will Not Result in Extinction of the Species*

We find that the exclusion of 40 ac (16 ha) of private lands in the Pan Hot

Springs Meadow from the final critical habitat designations will not result in the extinction of *Poa atropurpurea* or *Taraxacum californicum* because these lands, determined to contain the features essential to the conservation of this species, will be conserved and managed for the benefit of these species. The approximately 40 ac (16 ha) owned by the BBCCSD will be permanently protected and managed under the agreements in the HMP. The management activities to be implemented in the Pan Hot Springs Meadow will provide for the enhancement and preservation of the features essential to the conservation of *P. atropurpurea* and *T. californicum*. Additionally, because the 40 ac (16 ha) are occupied by *P. atropurpurea* and *T. californicum*, any future consultations under section 7(a)(2) of the Act that involve these lands will occur even in the absence of their designation as critical habitat. Application of the jeopardy standard of section 7 of the Act provides assurances that the species will not go extinct.

**Required Determinations**

*A. Regulatory Planning and Review*

The Office of Management and Budget has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an economic effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

Further, Executive Order 12866, as well as the Regulatory Flexibility Act as amended by SBREFA (Office of Management and Budget, Circular A–4, September 17, 2003) directs Federal agencies issuing regulations to evaluate regulatory alternatives. Under Circular A–4 and the Regulatory Flexibility Act as amended by SBREFA, once an agency determines that a regulatory action is appropriate, the agency needs to consider alternative regulatory approaches. Because the designation of critical habitat is a statutory requirement under the Act, we must evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our critical habitat designations, we consider economic impacts, impacts to national security, and other relevant impacts under section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the critical habitat designations providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. We believe that the evaluation of the inclusion or exclusion of particular areas, including consideration of whether areas resulting in disproportionate impacts to small entities should be designated or not, or combination of both, constitutes our regulatory alternative analysis for critical habitat designations.

Based on our final EA of the proposed designations, we provide our analysis for determining whether the rule will result in a significant economic impact on a substantial number of small entities.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under these designations as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the final designations of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (such as residential development and dispersed recreation activities). In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Federal agencies must consult with us under section 7 of the Act if activities they conduct, fund, permit, or authorize may affect designated critical habitat. The designation of critical habitat will not affect activities that do not have any Federal involvement.

Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

The EA analyzes whether a particular group or economic sector is expected to bear an undue proportion of the impacts. Appendix B of the final EA describes potential impacts of the proposed designations to small entities. Appendix B considers the extent to which the incremental impacts results presented in the previous sections reflect potential future impacts to small entities and the energy industry. The screening analysis is based on the estimated impacts associated with the proposed rulemaking as described in chapters 3 through 8 of the final EA. The analysis evaluates the potential for economic impacts related to several categories, including: (1) recreation; (2) transportation; (3) mining; (4) grazing; (5) invasive, non-native species management; and (6) development and hydrological regime. As summarized

below and presented in more detail in Section B.1.2 of the final EA, the BBCCSD is the only small entity expected to be affected by this rulemaking.

Post-designation incremental impacts associated with critical habitat designation-related conservation activities are not expected for mining (Chapter 5); grazing (Chapter 6); invasive, nonnative species management (Chapter 7); and development and water source alteration activities (Chapter 8). The incremental administrative costs of post-designation section 7 consultations and technical assistance requests (Appendix A) associated with the critical habitat designations, as well as incremental impacts associated with transportation projects (Chapter 4), will be borne by State and Federal government agencies. These agencies are Caltrans, the USFS, and the Service. The State and Federal governments are not considered small entities by the SBA. As described in Chapter 3 of the final EA, post-designation incremental impacts of critical habitat associated with recreation are related to Phase Two of the proposed community park in Unit 1 by BBCCSD. BBCCSD provides fire, water, sanitation, and refuse services for approximately 10,000 residents in unincorporated areas of Big Bear Valley and is considered a small entity by the SBA.

This screening analysis focuses on small entities that may bear the regulatory costs quantified in chapters 3 through 8 of the final EA. Of the affected activities discussed in the economic analysis, only impacts related to the development of recreation facilities (see Chapter 3 of the final EA) are forecast to be borne by small entities (BBCCSD, a small governmental jurisdiction). As described in section B.1 of the final EA, the screening analysis focuses on economic impacts resulting from modifications to recreation facility development activities in the designations by BBCCSD.

The incremental impact consists of a percentage of costs of conducting the Environmental Review (ER) for Phase two of a proposed park under the California Environmental Quality Act (CEQA) that is attributable to the critical habitat designations for *Poa atropurpurea* and *Taraxacum californicum* and implementation of the anticipated mitigation or conservation measures stemming from the ER. The total cost of the CEQA process is expected to range between $150,000 and $300,000, of which approximately $100,000 to $200,000 is considered incremental impact as this is the additional cost of the ER anticipated to stem from the designation of critical habitat.

The likely mitigation or conservation measures under CEQA to protect the habitat following the final designations of critical habitat is anticipated to vary from a minimal modification of the park design such that the occurrences of *Poa atropurpurea* (or areas close to the occurrences) are well-protected and are located in the more passive portions of the park to a possible relocation of the park to a more suitable location outside of Unit 1 (or to provide land elsewhere for the protection of the species in lieu of this habitat). The design modification of the proposed park is expected to cost approximately $20,000. In the extreme case that the 25-ac (10-ha) park must be relocated, BBCCSD could potentially need to locate and purchase a 25-ac (10-ha) tract of land outside the proposed critical habitat. Because regional land values are high, a 25-ac (10-ha) parcel with development potential is expected to cost between $3.0 and $4.0 million. In total, BBCCSD is expected to experience an annualized impact that ranges from a low of $10,000 to a high of $347,000. The annualized impacts are equivalent to 0.1 to 2.9 percent of BBCCSD's annual operating budget (approximately $12.1 million).

The upper bound of the annualized impact of 2.9 percent of BBCCSD's annual operating budget may be considered a potential significant economic impact. We considered this potentially significant economic impact and the disproportionate impact to the BBCCSD (a small entity) as part of our analysis under section 4(b)(2) of the Act, and ultimately decided to exclude Unit 1 from the critical habitat designations. Consequently, we have determined and, therefore, certify that, based on the exclusion of Unit 1 and the fact that only one small entity would be impacted, the designations will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

*Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)-(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or [T]ribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. As discussed in the final EA, approximately 85 percent of the lands proposed as critical habitat are owned or managed by Federal, State, or

local governments, only one of which, the BBCCSD, qualifies as a small government. The annualized impacts are equivalent to 0.1 to 2.9 percent of BBCCSD's annual operating budget (approximately $12.1 million). However, we have excluded the lands owned by the BBCCSD from these critical habitat designations under section 4(b)(2) of the Act, in part because the potential economic impact to BBCCSD as a small entity may be disproportionate. Consequently, we do not believe that these critical habitat designations would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

*Takings*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for *Poa atropurpurea* and *Taraxacum californicum* in a takings implications assessment. The takings implications assessment concludes that these designations of critical habitat for *P. atropurpurea* and *T. californicum* do not pose significant takings implications for lands within or affected by the designations.

*Federalism*

In accordance with E.O. 13132 (Federalism), this final rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, these final critical habitat designations with appropriate State resource agencies in California. The designations may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur). During the three public comment periods, we contacted appropriate State and local agencies and jurisdictions, and invited them to comment on the proposed critical habitat designations for *Poa atropurpurea* and *Taraxacum californicum*. In total, we responded to six letters received during these comment periods (see ''Summary of Comments and Recommendations'' section).

*Civil Justice Reform*

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of *Poa atropurpurea* and *Taraxacum californicum* within the designated areas to assist the public in understanding the habitat needs of these species.

*Paperwork Reduction Act of 1995*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (NEPA)*

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Circuit Court of the United States for the Ninth Circuit (Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

*Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

Following publication of the August 7, 2007, proposed rule (72 FR 44232), a private citizen presented us with information identifying historical, religious, and cultural resources important to the San Manuel Band of Serrano Mission Indians in proposed Unit 1, although these lands are not specifically part of the Tribal Trust lands of the San Manuel Band of Serrano Mission Indians. In the April 16, 2008, NOA for the draft EA (73 FR 20600), we specifically solicited comments from the San Manuel Band of Serrano Mission Indians regarding the potential impacts of the proposed rule on the San Manuel Band of Serrano Mission Indians. We requested this input from the San Manuel Band of Serrano Mission Indians in accordance with Secretarial Order 3206 section 3(B)(4) and E.O. 13007. On April 15, 2008, we transmitted a letter to the San Manuel Band of Serrano Mission Indians indicating our interest in discussing the proposed designations of critical habitat and requested information from the San Manuel Band of Serrano Mission Indians that would contribute to the decision process. On May 12, 2008, we received an electronic mail response to our letter indicating that the San Manuel Band of Serrano Mission Indians would like to coordinate with us to discuss the critical habitat designations. We subsequently met with representatives of the San Manuel Band of Serrano Mission Indians. Through this coordination, we believe we addressed the concerns of the San Manuel Band of Serrano Mission Indians in this final rule. As a result of our coordination and analysis of all information available, we concluded that the designation of critical habitat would not adversely impact the San Manuel Band of Serrano Mission Indians. We recognize that the San Manuel Band of Serrano Mission Indians' ancestral lands include the San Bernardino Mountains, including areas that we have designated as critical habitat. From our discussion with the representatives of the San Manuel Band of Serrano Mission Indians, we do not

believe that activities that the San Manuel Band of Serrano Mission Indians regularly conducts on federally owned lands included in these designations will negatively impact the PCEs or adversely modify critical habitat. We do not believe that these activities will require a section 7 consultation due to the designation of critical habitat. The designation of critical habitat will not impose any regulatory or restrictive authority over the San Manuel Band of Serrano Mission Indians nor change access to or restrict Tribal activities on designated lands. Additionally, we determined that the benefits of exclusion outweigh the benefits of inclusion for those areas of Unit 1 covered by the HMP, which includes historical, religious, and cultural resources important to the San Manuel Band of Serrano Mission Indians, and we have excluded Unit 1 from critical habitat (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

*Energy Supply, Distribution, or Use*

On May 18, 2001, the President issued an Executive Order (E.O. 13211; ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'') on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared without the regulatory action under consideration. The economic analysis finds that none of these criteria is relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with *Poa atropurpurea* and *Taraxacum californicum* conservation activities within the final critical habitat designations are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

**References Cited**

A complete list of all references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/carlsbad/*.

**Author(s)**

The primary author of this package is the staff of the Carlsbad Fish and Wildlife Office.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Final Regulation Promulgation**

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.12(h), revise the entries for ''*Poa atropurpurea*'' and ''*Taraxacum californicum*'' under ''FLOWERING PLANTS'' in the List of Endangered and Threatened Plants to read as follows:

**§ 17.12 Endangered and threatened plants.**

(h) * * *

| Species Name | | Historic range | Family | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Scientific name | Common name | | | | | | |
| FLOWERING PLANTS | | | | | | | |
| ***** | | | | | | | |
| *Poa atropurpurea* | San Bernardino bluegrass | U.S.A. (CA) | Poaceae | E | 644 | 17.96(a) | NA |
| ***** | | | | | | | |
| *Taraxacum californicum* | California taraxacum | U.S.A. (CA) | Asteraceae | E | 644 | 17.96(a) | NA |
| ***** | | | | | | | |

■ 3. Amend § 17.96(a) by adding an entry for ''*Taraxacum californicum*'' in alphabetical order under Family *Asteraceae* and by adding an entry for ''*Poa atropurpurea*'' in alphabetical order under Family *Poaceae*, to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) Flowering plants.

* * * * *

Family *Asteraceae: Taraxacum californicum* (California taraxacum)

(1) Critical habitat units are depicted for San Bernardino County, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Taraxacum californicum* are:

(i) Wet meadows subject to flooding during wet years and forest openings with seeps, springs, or creeks in the San Bernardino Mountains in San Bernardino County located at elevations of 6,700 to 9,000 feet (2,000 to 2,800 meters), that provide space for individual and population growth, reproduction, and dispersal; and

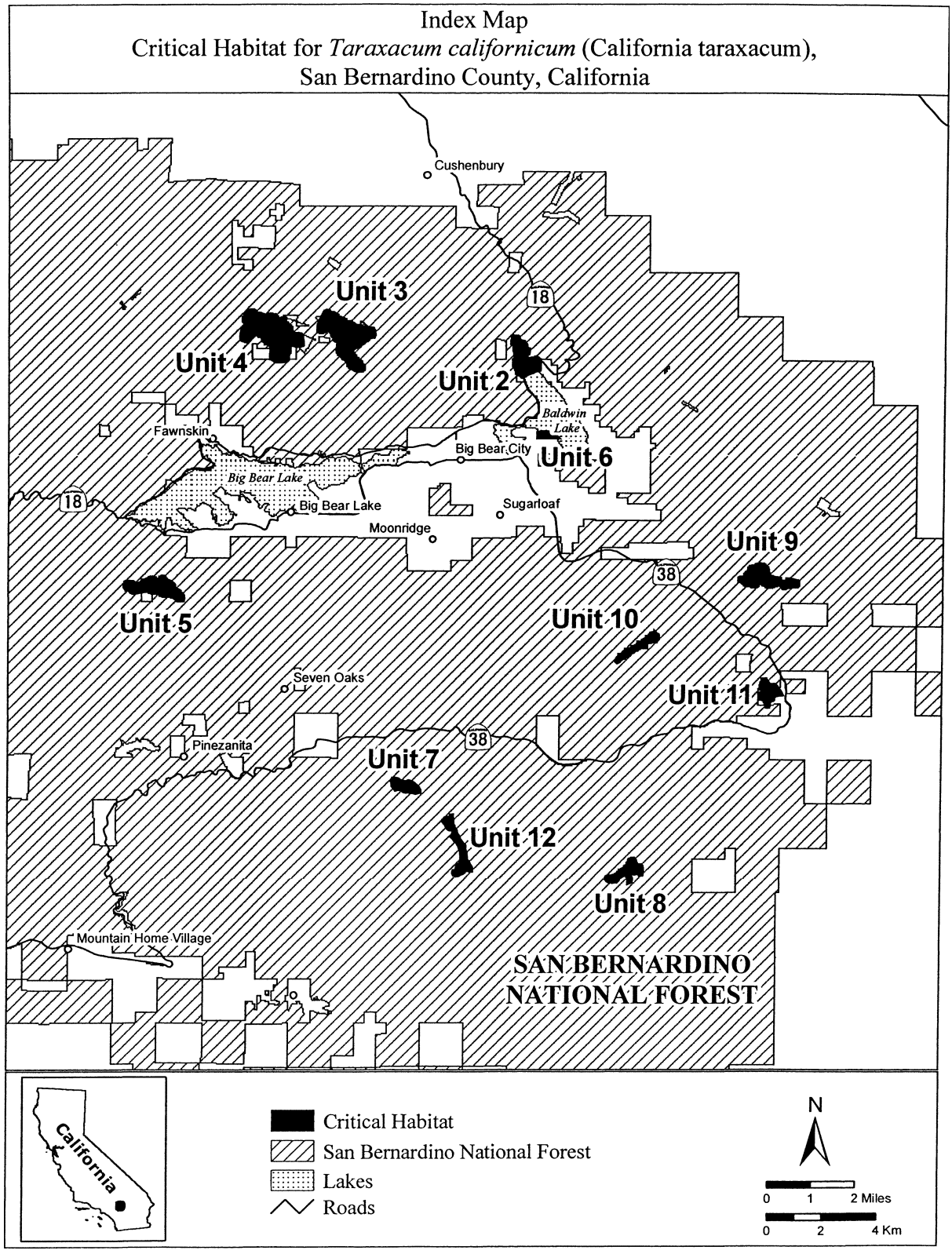
(ii) Well-drained, loamy alluvial to sandy loam soils occurring in the wet meadow system or forest openings with seeps, springs, or creeks, with a 0 to 46 percent slope, to provide water, air, minerals, and other nutritional or physiological requirements to the species.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Data layers defining map units were created on a base of USGS 1:24,000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) Note: Index map of critical habitat units for *Taraxacum californicum* (California taraxacum) follows:

**BILLING CODE 4310–55–S**




**BILLING CODE 4310–55–C**

(6) Unit 2: North Baldwin Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Big Bear City, land bounded by the following UTM NAD27 coordinates (E,N): 516578, 3795213; 516595, 3795205; 516597, 3795204; 516602, 3795201; 516608, 3795198; 516613, 3795194; 516618, 3795190; 516623, 3795185; 516628, 3795181; 516632, 3795176; 516632, 3795175; 516639, 3795166; 516642, 3795161; 516646, 3795156; 516649, 3795150; 516652, 3795144; 516654, 3795138; 516656, 3795132; 516656, 3795131; 516659, 3795122; 516660, 3795116; 516661, 3795109; 516661, 3795108; 516662, 3795107; 516668, 3795104; 516674, 3795101; 516680, 3795098; 516685, 3795094; 516690, 3795090; 516695, 3795085; 516699, 3795081; 516703, 3795076; 516707, 3795070; 516711, 3795065; 516714, 3795059; 516716, 3795053; 516719, 3795047; 516721, 3795041; 516722, 3795034; 516723, 3795028; 516724, 3795021; 516724, 3795015; 516724, 3795008; 516723, 3795002; 516723, 3795000; 516725, 3794999; 516731, 3794997; 516736, 3794994; 516742, 3794990; 516747, 3794986; 516752, 3794982; 516756, 3794979; 516759, 3794976; 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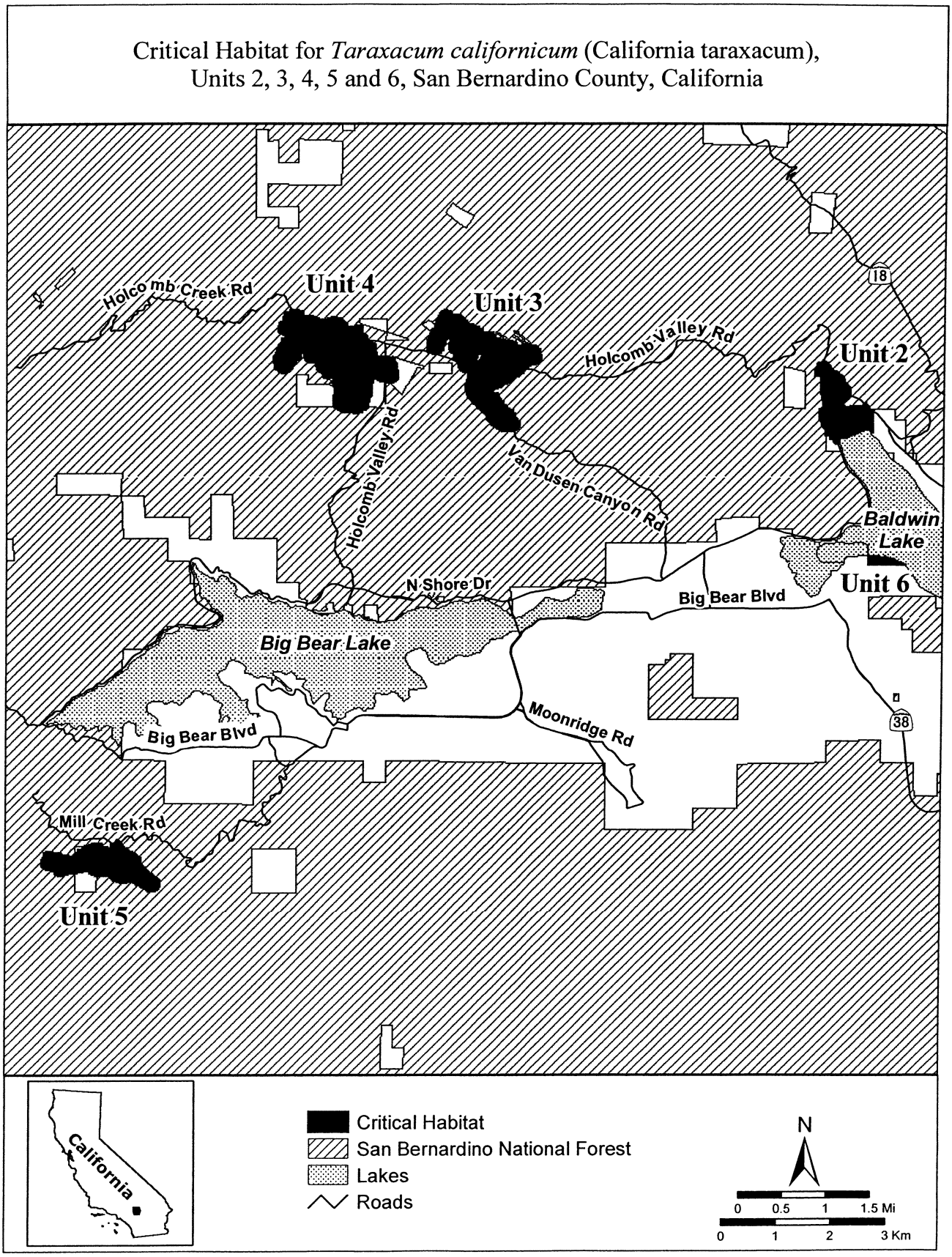
(ii) Note: Map of Units 2, 3, 4, 5, and 6 for *Taraxacum californicum* follows:

**BILLING CODE 4310–55-S**




BILLING CODE 4310–55–C

(7) Unit 3: Belleville Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Fawnskin, land bounded by the following UTM NAD27 coordinates (E,N): 509560, 3796268; 509577, 3796255; 509585, 3796255; 509587, 3796256; 509594, 3796255; 509600, 3796255; 509604, 3796254; 509609, 3796253; 509637, 3796250; 509637, 3796250; 509644, 3796249; 509650, 3796247; 509657, 3796245; 509659, 3796244; 509672, 3796239; 509687, 3796236; 509693, 3796235; 509699, 3796233; 509705, 3796231; 509711, 3796228; 509717, 3796225; 509722, 3796222; 509728, 3796218; 509732, 3796215; 509748, 3796201; 509749, 3796200; 509751, 3796198; 509768, 3796182; 509772, 3796179; 509773, 3796178; 509776, 3796175; 509796, 3796156; 509797, 3796155; 509802, 3796150; 509806, 3796145; 509809, 3796140; 509813, 3796134; 509816, 3796128; 509819, 3796122; 509821, 3796116; 509823, 3796110; 509824, 3796104; 509825, 3796102; 509826, 3796096; 509828, 3796096; 509835, 3796095; 509841, 3796094; 509848, 3796093; 509854, 3796091; 509860, 3796089; 509861, 3796088; 509878, 3796081; 509884, 3796078; 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(ii) Note: Unit 3 for *Taraxacum californicum* is depicted on the map in paragraph (6)(ii) of this entry.

(8) Unit 4: Hitchcock Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Fawnskin, land bounded by the following UTM NAD27 coordinates (E,N): 507473, 3794979; 507468, 3794984; 507464, 3794989; 507460, 3794994; 507459, 3794996; 507457, 3794999; 507456, 3795000; 507454, 3795005; 507452, 3795007; 507444, 3795025; 507443, 3795029; 507440, 3795035; 507440, 3795037; 507438, 3795041; 507437, 3795048; 507436, 3795054; 507435, 3795061; 507435, 3795067; 507435, 3795074; 507436, 3795080; 507437, 3795087; 507437, 3795088; 507443, 3795114; 507444, 3795119; 507446, 3795126; 507448, 3795132; 507451, 3795138; 507454, 3795144; 507455, 3795144; 507455, 3795150; 507455, 3795152; 507455, 3795154; 507455, 3795155; 507449, 3795159; 507448, 3795158; 507442, 3795156; 507441, 3795156; 507438, 3795156; 507429, 3795153; 507424, 3795151; 507421, 3795149; 507420, 3795148; 507419, 3795148; 507413, 3795145; 507407, 3795143; 507400, 3795141; 507394, 3795139; 507388, 3795138; 507381, 3795138; 507375, 3795137; 507368, 3795138; 507361, 3795138; 507355, 3795139; 507349, 3795141; 507342, 3795143; 507338, 3795144; 507309, 3795156; 507307, 3795156; 507301, 3795159; 507296, 3795162; 507290, 3795166; 507285, 3795169; 507280, 3795174; 507275, 3795178; 507270, 3795183; 507266, 3795188; 507264, 3795191; 507255, 3795204; 507254, 3795206; 507253, 3795206; 507250, 3795211; 507247, 3795217; 507246, 3795219; 507244, 3795223; 507244, 3795223; 507239, 3795237; 507234, 3795238; 507227, 3795240; 507221, 3795242; 507215, 3795244; 507209, 3795247; 507203, 3795250; 507198, 3795253; 507194, 3795255; 507185, 3795262; 507183, 3795264; 507178, 3795268; 507173, 3795272; 507169, 3795277; 507165, 3795282; 507161, 3795287; 507157, 3795293; 507154, 3795299; 507151, 3795305; 507149, 3795311; 507147, 3795317; 507146, 3795323; 507145, 3795330; 507144, 3795336; 507144, 3795340; 507141, 3795344; 507138, 3795349; 507135, 3795355; 507132, 3795361; 507130, 3795367; 507128, 3795374; 507127, 3795380; 507125, 3795386; 507125, 3795393; 507125, 3795398; 507124, 3795410; 507122, 3795423; 507122, 3795427; 507121, 3795430; 507119, 3795453; 507119, 3795456; 507119, 3795463; 507119, 3795470; 507119, 3795471; 507116, 3795469; 507107, 3795464; 507107, 3795463; 507103, 3795459; 507098, 3795454; 507093, 3795450; 507088, 3795446; 507088, 3795446; 507081, 3795442; 507076, 3795439; 507070, 3795436; 507066, 3795434; 507066, 3795433; 507060, 3795431; 507054, 3795428; 507047, 3795426; 507041, 3795425; 507035, 3795424; 507028, 3795423; 507021, 3795423; 507013, 3795423; 507008, 3795423; 506989, 3795428; 506970, 3795437; 506953, 3795449; 506938, 3795464; 506926, 3795481; 506918, 3795500; 506912, 3795520; 506912, 3795522; 506909, 3795539; 506909, 3795541; 506906, 3795565; 506908, 3795573; 506908, 3795574; 506910, 3795581; 506912, 3795587; 506915, 3795593; 506916, 3795596; 506915, 3795599; 506914, 3795606; 506913, 3795612; 506912, 3795619; 506912, 3795625; 506912, 3795632; 506912, 3795634; 506914, 3795650; 506915, 3795663; 506915, 3795667; 506916, 3795673; 506918, 3795679; 506920, 3795686; 506922, 3795690; 506922, 3795691; 506916, 3795694; 506911, 3795698; 506909, 3795699; 506905, 3795702; 506891, 3795696; 506867, 3795682; 506855, 3795669; 506850, 3795664; 506847, 3795660; 506829, 3795660; 506799, 3795660; 506799, 3795669; 506797, 3795670; 506782, 3795676; 506781, 3795666; 506779, 3795650; 506780, 3795649; 506782, 3795647; 506794, 3795631; 506794, 3795630; 506799, 3795630; 506799, 3795623; 506801, 3795619; 506809, 3795602; 506805, 3795585; 506801, 3795570; 506797,

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(ii) Note: Unit 4 for *Taraxacum californicum* is depicted on the map in paragraph (6)(ii) of this entry.

(9) Unit 5: Bluff Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Big Bear Lake, land bounded by the following UTM NAD27 coordinates (E,N): 502768, 3786471; 502770,

3786472; 502816, 3786510; 502819, 3786513; 502824, 3786517; 502830, 3786520; 502836, 3786523; 502840, 3786525; 502872, 3786539; 502901, 3786555; 502904, 3786556; 502954, 3786581; 502955, 3786582; 502961, 3786584; 502967, 3786587; 502973, 3786589; 502980, 3786590; 502985, 3786591; 503002, 3786593; 503038, 3786599; 503039, 3786599; 503044, 3786599; 503047, 3786602; 503051, 3786606; 503057, 3786610; 503062, 3786614; 503067, 3786618; 503073, 3786621; 503079, 3786624; 503085, 3786626; 503092, 3786628; 503098, 3786629; 503104, 3786630; 503111, 3786631; 503113, 3786631; 503117, 3786632; 503123, 3786634; 503129, 3786636; 503135, 3786637; 503153, 3786639; 503154, 3786639; 503160, 3786640; 503167, 3786640; 503173, 3786640; 503180, 3786639; 503186, 3786638; 503193, 3786637; 503199, 3786635; 503205, 3786633; 503211, 3786630; 503217, 3786627; 503222, 3786623; 503228, 3786620; 503233, 3786615; 503237, 3786611; 503242, 3786606; 503245, 3786602; 503256, 3786592; 503266, 3786584; 503266, 3786584; 503271, 3786580; 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3786126; 502418, 3786129; 502412, 3786133; 502407, 3786137; 502403, 3786142; 502398, 3786147; 502394, 3786152; 502390, 3786157; 502389, 3786159; 502387, 3786163; 502384, 3786168; 502381, 3786174; 502381, 3786174; 502377, 3786176; 502371, 3786179; 502370, 3786179; 502350, 3786189; 502345, 3786192; 502343, 3786193; 502319, 3786207; 502311, 3786207; 502310, 3786207; 502303, 3786207; 502297, 3786207; 502295, 3786207; 502264, 3786209; 502260, 3786210; 502259, 3786210; 502253, 3786211; 502247, 3786212; 502241, 3786214; 502234, 3786217; 502228, 3786219; 502223, 3786222; 502217, 3786226; 502212, 3786230; 502208, 3786233; 502190, 3786248; 502189, 3786249; 502184, 3786254; 502180, 3786258; 502176, 3786263; 502172, 3786269; 502171, 3786270; 502168, 3786274; 502165, 3786280; 502163, 3786286; 502160, 3786292; 502158, 3786298; 502157, 3786305; 502156, 3786311; 502155, 3786318; 502155, 3786324; 502155, 3786331; 502156, 3786335; 502158, 3786358; 502158, 3786360; 502159, 3786367; 502161, 3786373; 502163, 3786379; 502165, 3786385; 502166, 3786389; 502179, 3786416; 502180, 3786419; 502184, 3786425; 502187,3786431; 502191, 3786436; 502195, 3786441; 502199, 3786446; 502204, 3786450; 502209, 3786454; 502215, 3786458; 502220, 3786462; 502226, 3786465; 502231, 3786467; 502239, 3786470; 502249, 3786475; 502250, 3786475; 502256, 3786477; 502262, 3786479; 502268, 3786481; 502275, 3786482; 502281, 3786482; 502288, 3786483; 502294, 3786482; 502301, 3786482; 502306, 3786481; 502334, 3786476; 502335, 3786476; 502365, 3786470; 502367, 3786471; 502374, 3786472; 502380, 3786472; 502387, 3786473; 502393, 3786472; 502419, 3786471; 502434, 3786470; 502434, 3786470; 502441, 3786469; 502447, 3786468; 502453, 3786467; 502460, 3786465; 502466, 3786462; 502472, 3786460; 502477, 3786457; 502495, 3786447; 502495, 3786446; 502501, 3786443; 502505, 3786440; 502526, 3786425; 502531, 3786425; 502538, 3786425; 502544, 3786424; 502551, 3786423; 502557, 3786422; 502559, 3786421; 502560, 3786421; 502567, 3786420; 502573, 3786418; 502579, 3786417; 502588, 3786413; 502595, 3786412; 502601, 3786411; 502607, 3786409; 502613, 3786407; 502619, 3786404; 502625, 3786401; 502630, 3786397; 502636, 3786393; 502641, 3786389; 502646, 3786385; 502649, 3786382; 502671, 3786396; 502717, 3786426; 502745, 3786447; 502747, 3786450; 502749, 3786452; 502763, 3786466; 502764, 3786467; returning to 502768, 3786471.

(ii) Note: Unit 5 for 2, 3, 4, 5, and 6 *Taraxacum californicum* is depicted on the map in paragraph (6)(ii) of this entry.

(10) Unit 6: North Shay Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Big Bear City, land bounded by the following UTM NAD27 coordinates (E,N): 517196, 3791888; 517196, 3791904; 517240, 3791919; 517315, 3791927; 517405, 3791930; 517486, 3791923; 517594, 3791902; 517674, 3791877; 517734, 3791836; 517815, 3791781; 517839, 3791756; 517766, 3791756; 517730, 3791757; 517694, 3791757; 517675, 3791757; 517619, 3791758; 517577, 3791758; 517502, 3791759; 517469, 3791759; 517422, 3791759; 517367, 3791760; 517344, 3791760; 517310, 3791760; 517280, 3791761; 517243, 3791761; 517195, 3791762; 517195, 3791777; 517195, 3791798; 517195, 3791829; 517196, 3791866; returning to 517196, 3791888.

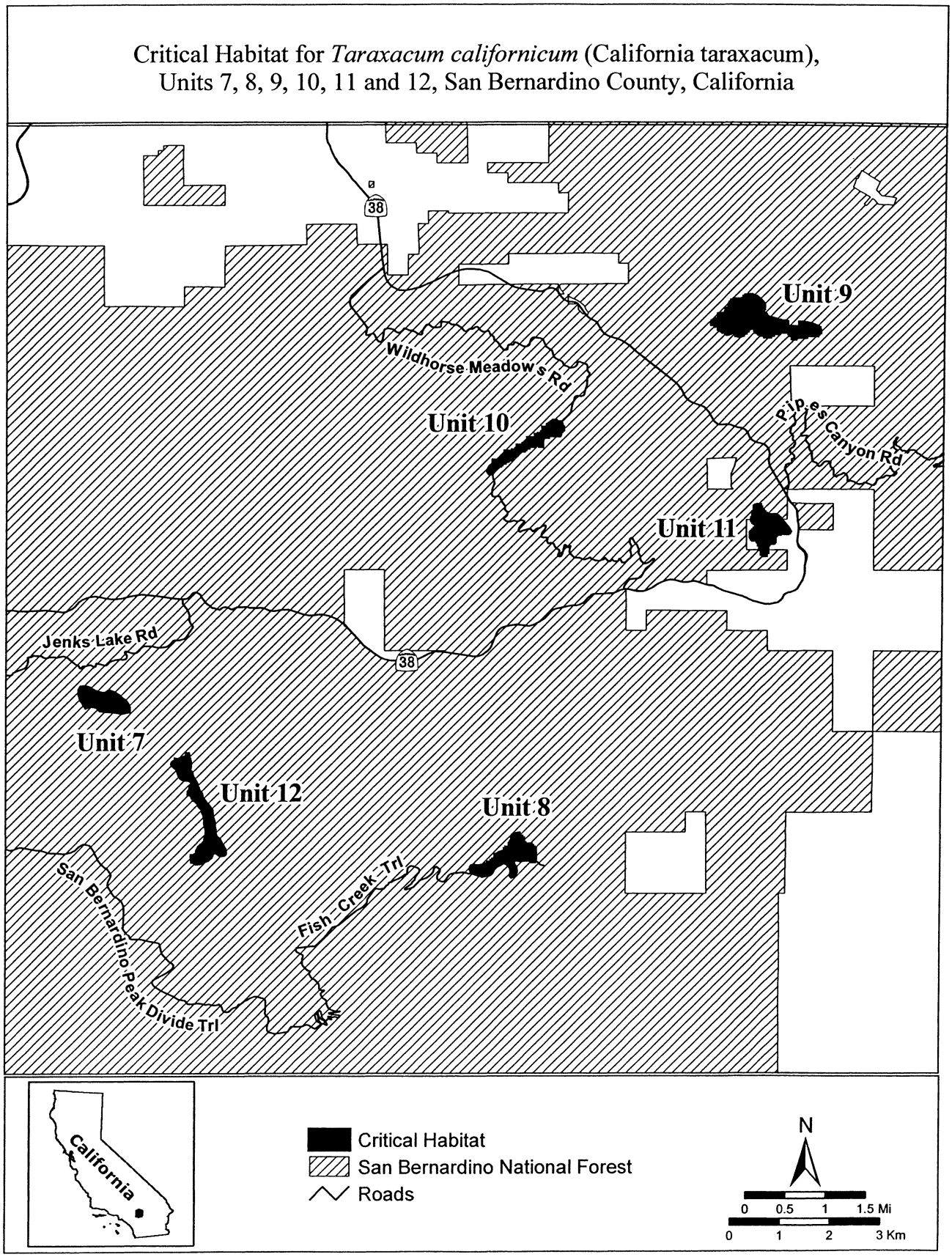
(ii) Note: Unit 6 for *Taraxacum californicum* is depicted on the map in paragraph (6)(ii) of this entry.

(11) Unit 7: Horse Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Moonridge, land bounded by the following UTM NAD27 coordinates (E,N): 512329, 3779237; 512402, 3779220; 512461, 3779223; 512527, 3779265; 512638, 3779227; 512725, 3779175; 512784, 3779116; 512843, 3779078; 512888, 3779019; 512919, 3778956; 512926, 3778935; 512922, 3778873; 512791, 3778848; 512659, 3778876; 512537, 3778887; 512433, 3778890; 512350, 3778900; 512284, 3778966; 512159, 3778994; 512061, 3778963; 512020, 3779039; 511975, 3779095; 511947, 3779199; 511936, 3779293; 511968, 3779345; 512051, 3779355; 512145, 3779331; 512190, 3779296; 512249, 3779265; returning to 512329, 3779237.

(ii) Note: Map of Units 7, 8, 9, 10, 11, and 12 for *Taraxacum californicum* follows:

BILLING CODE 4310–55-S




BILLING CODE 4310–55–C

(12) Unit 8: Fish Creek Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle maps Moonridge and San Gorgonio Mountain, land bounded by the following UTM NAD27 coordinates (E,N): 521043, 3776130; 521043, 3776107; 521043, 3776100; 521042, 3776094; 521041, 3776087; 521040, 3776081; 521039, 3776080; 521042, 3776075; 521042, 3776075; 521045, 3776069; 521047, 3776063; 521049, 3776056; 521051, 3776050; 521052, 3776043; 521052, 3776039; 521055, 3776005; 521056, 3776002; 521056, 3775996; 521056, 3775973; 521056, 3775967; 521055, 3775960; 521054, 3775954; 521052, 3775947; 521050, 3775941; 521048, 3775935; 521045, 3775929; 521045, 3775929; 521036, 3775910; 521033, 3775904; 521029, 3775899; 521026, 3775893; 521021, 3775888; 521019, 3775886; 521019, 3775890; 520989, 3775890; 520989, 3775920; 520959, 3775920; 520959, 3775950; 520941, 3775950; 520930, 3775942; 520899, 3775936; 520899, 3775920; 520869, 3775920; 520839, 3775920; 520811, 3775920; 520787, 3775916; 520762, 3775916; 520743, 3775916; 520737, 3775920; 520719, 3775920; 520719, 3775931; 520718, 3775932; 520699, 3775945; 520689, 3775950; 520689, 3775950; 520659, 3775950; 520634, 3775950; 520629, 3775949; 520629, 3775920; 520607, 3775920; 520600, 3775910; 520600, 3775910; 520599, 3775902; 520599, 3775892; 520605, 3775871; 520617, 3775816; 520649, 3775772; 520662, 3775739; 520668, 3775689; 520655, 3775653; 520642, 3775633; 520622, 3775612; 520584, 3775595; 520576, 3775604; 520572, 3775627; 520577, 3775666; 520577, 3775721; 520557, 3775780; 520524, 3775816; 520504, 3775848; 520488, 3775878; 520471, 3775893; 520445, 3775897; 520419, 3775875; 520410, 3775866; 520399, 3775864; 520380, 3775855; 520358, 3775837; 520271, 3775795; 520217, 3775748; 520191, 3775699; 520179, 3775662; 520164, 3775648; 520137, 3775633; 520081, 3775624; 520046, 3775620; 519990, 3775611; 519949, 3775631; 519921, 3775634; 519862, 3775646; 519823, 3775660; 519787, 3775685; 519766, 3775724; 519765, 3775743; 519769, 3775766; 519787, 3775787; 519842, 3775797; 519886, 3775793; 519933, 3775793; 519990, 3775805; 520046, 3775812; 520059, 3775814; 520059, 3775830; 520089, 3775830; 520119, 3775830; 520119, 3775860; 520149, 3775860; 520159, 3775860; 520171, 3775871; 520179, 3775877; 520179, 3775890; 520198, 3775890; 520209, 3775897; 520209, 3775920; 520236, 3775920; 520238, 3775922; 520255, 3775970; 520267, 3775992; 520267, 3775993; 520269, 3775995; 520269, 3775995; 520269, 3776010; 520277, 3776010; 520281, 3776016; 520333, 3776059; 520380, 3776068; 520419, 3776062; 520419, 3776070; 520449, 3776070; 520449, 3776100; 520449, 3776130; 520479, 3776130; 520479, 3776160; 520509, 3776160; 520509, 3776130; 520539, 3776130; 520539, 3776120; 520569, 3776142; 520569, 3776160; 520539, 3776160; 520539, 3776190; 520539, 3776220; 520539, 3776247; 520541, 3776249; 520546, 3776253; 520551, 3776256; 520556, 3776260; 520560, 3776262; 520564, 3776266; 520569, 3776271; 520574, 3776275; 520580, 3776279; 520585, 3776282; 520591, 3776285; 520593, 3776286; 520593, 3776289; 520592, 3776294; 520592, 3776300; 520592, 3776307; 520593, 3776311; 520596, 3776340; 520596, 3776342; 520597, 3776348; 520599, 3776355; 520601, 3776361; 520603, 3776367; 520606, 3776373; 520609, 3776379; 520612, 3776384; 520616, 3776390; 520620, 3776395; 520625, 3776400; 520629, 3776404; 520635, 3776408; 520640, 3776412; 520645, 3776415; 520651, 3776419; 520657, 3776421; 520663, 3776424; 520667, 3776425; 520698, 3776434; 520701, 3776435; 520708, 3776436; 520714, 3776438; 520719, 3776438; 520719, 3776430; 520719, 3776400; 520719, 3776370; 520749, 3776370; 520779, 3776370; 520779, 3776340; 520809, 3776340; 520809, 3776310; 520809, 3776280; 520809, 3776250; 520839, 3776250; 520839, 3776220; 520840, 3776220; 520869, 3776220; 520899, 3776220; 520929, 3776220; 520959, 3776220; 520959, 3776190; 520989, 3776190; 520989, 3776160; 521019, 3776160; 521019, 3776130; returning to 521043, 3776130.

(ii) Note: Unit 8 for *Taraxacum californicum* is depicted on the map in paragraph (12)(ii) of this entry.

(13) Unit 9: Broom Flat Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Onyx Peak, land bounded by the following UTM NAD27 coordinates (E,N): 524923, 3786493; 524917, 3786491; 524910, 3786489; 524908, 3786489; 524900, 3786483; 524900, 3786481; 524900, 3786475; 524900, 3786468; 524899, 3786461; 524898, 3786455; 524897, 3786449; 524895, 3786442; 524892, 3786436; 524890, 3786430; 524887, 3786425; 524883, 3786419; 524879, 3786414; 524875, 3786409; 524871, 3786404; 524866, 3786399; 524861, 3786395; 524858, 3786393; 524846, 3786385; 524844, 3786383; 524838, 3786380; 524832, 3786377; 524829, 3786375; 524829, 3786390; 524799, 3786390; 524799, 3786420; 524769, 3786420; 524739, 3786420; 524739, 3786450; 524709, 3786450; 524709, 3786480; 524679, 3786480; 524649, 3786480; 524649, 3786510; 524649, 3786540; 524619, 3786540; 524589, 3786540; 524589, 3786570; 524559, 3786570; 524529, 3786570; 524514, 3786570; 524514, 3786573; 524515, 3786580; 524517, 3786586; 524519, 3786592; 524521, 3786599; 524524, 3786604; 524527, 3786610; 524530, 3786616; 524534, 3786621; 524539, 3786627; 524540, 3786630; 524559, 3786630; 524589, 3786630; 524589, 3786660; 524619, 3786660; 524649, 3786660; 524679, 3786660; 524709, 3786660; 524739, 3786660; 524739, 3786690; 524769, 3786690; 524799, 3786690; 524829, 3786690; 524829, 3786720; 524829, 3786750; 524799, 3786750; 524769, 3786750; 524739, 3786750; 524709, 3786750; 524679, 3786750; 524649, 3786750; 524649, 3786750; 524651, 3786751; 524657, 3786754; 524662, 3786757; 524669, 3786759; 524675, 3786761; 524681, 3786763; 524686, 3786764; 524712, 3786768; 524714, 3786768; 524720, 3786769; 524727, 3786769; 524729, 3786769; 524743, 3786768; 524743, 3786768; 524755, 3786768; 524760, 3786768; 524766, 3786767; 524771, 3786767; 524780, 3786765; 524782, 3786765; 524782, 3786777; 524782, 3786782; 524783, 3786789; 524784, 3786795; 524785, 3786801; 524787, 3786808; 524789, 3786814; 524792, 3786820; 524793, 3786821; 524797, 3786829; 524799, 3786833; 524803, 3786839; 524806, 3786844; 524811, 3786849; 524815, 3786854; 524820, 3786858; 524825, 3786863; 524830, 3786866; 524836, 3786870; 524842, 3786873; 524848, 3786876; 524854, 3786878; 524860, 3786880; 524865, 3786881; 524874, 3786883; 524869, 3786900; 524869, 3786902; 524867, 3786908; 524866, 3786914; 524866, 3786921; 524865, 3786927; 524866, 3786934; 524866, 3786941; 524867, 3786947; 524869, 3786953; 524871, 3786960; 524873, 3786966; 524876, 3786972; 524879, 3786977; 524882, 3786983; 524884, 3786986; 524893, 3786998; 524895, 3787000; 524895, 3787001; 524901, 3787009; 524905, 3787013; 524910, 3787018; 524914, 3787023; 524919, 3787027; 524925, 3787031; 524930, 3787034; 524936, 3787037; 524942, 3787040; 524948, 3787042; 524949, 3787042; 524959, 3787046; 524962, 3787047; 524968, 3787049; 524974, 3787051; 524980, 3787053; 524987, 3787054; 524993, 3787054; 524999, 3787054; 525018, 3787055; 525019,

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(ii) Note: Unit 9 for *Taraxacum californicum* is depicted on the map in paragraph (12)(ii) of this entry.

(14) Unit 10: Wildhorse Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Moonridge, land bounded by the following UTM NAD27 coordinates (E,N): 521409, 3784620; 521409, 3784590; 521439, 3784590; 521469, 3784590; 521469, 3784616; 521469, 3784616; 521477, 3784610; 521479, 3784609; 521484, 3784604; 521489, 3784600; 521493, 3784595; 521505, 3784582; 521505, 3784582; 521509, 3784577; 521513, 3784572; 521514, 3784571; 521521, 3784559; 521524, 3784554; 521527, 3784548; 521530, 3784543; 521532, 3784537; 521536, 3784525; 521536, 3784525; 521537, 3784524; 521539, 3784517; 521543, 3784514; 521548, 3784509; 521552, 3784504; 521556, 3784499; 521557, 3784499; 521557, 3784498; 521559, 3784496; 521559, 3784470; 521529, 3784470; 521529, 3784440; 521499, 3784440; 521499, 3784410; 521499, 3784398; 521502, 3784394; 521504, 3784377; 521494, 3784365; 521485, 3784361; 521476, 3784360; 521469, 3784360; 521469, 3784350; 521439, 3784350; 521409, 3784350; 521379, 3784350; 521379, 3784380; 521380, 3784410; 521349, 3784410; 521349, 3784380; 521319, 3784380; 521289, 3784380; 521289, 3784350; 521259, 3784350; 521259, 3784320; 521229, 3784320; 521199, 3784320; 521195, 3784320; 521185, 3784314; 521156, 3784289; 521153, 3784284; 521155, 3784280; 521152, 3784275; 521150, 3784267; 521144, 3784259; 521139, 3784249; 521124, 3784245; 521109, 3784236; 521109, 3784230; 521109, 3784200; 521139, 3784200; 521139, 3784170; 521139, 3784140; 521109, 3784140; 521109, 3784170; 521079, 3784170; 521049, 3784170; 521019, 3784170; 520989, 3784170; 520989, 3784140; 520959, 3784140; 520929, 3784140; 520899, 3784140; 520883, 3784131; 520869, 3784128; 520869, 3784110; 520839, 3784110; 520809, 3784110; 520809, 3784110; 520809, 3784080; 520779, 3784080; 520779, 3784050; 520749, 3784050; 520719, 3784050; 520712, 3784050; 520706, 3784046; 520689, 3784029; 520689, 3784020; 520679, 3784020; 520659, 3784003; 520659, 3783990; 520644, 3783990; 520629, 3783976; 520629, 3783960; 520609, 3783960; 520601, 3783954; 520577, 3783939; 520569, 3783934; 520569, 3783930; 520563, 3783930; 520550, 3783923; 520539, 3783920; 520539, 3783900; 520509, 3783900; 520509, 3783870; 520479, 3783870; 520449, 3783870; 520449, 3783840; 520419, 3783840; 520414, 3783840; 520402, 3783835; 520389, 3783826; 520389, 3783810; 520365, 3783810; 520357, 3783805; 520338, 3783793; 520329, 3783787; 520329, 3783780; 520322, 3783780; 520308, 3783765; 520307, 3783763; 520302, 3783758; 520300, 3783756; 520300, 3783756; 520299, 3783755; 520299, 3783750; 520293, 3783750; 520291, 3783748; 520274, 3783733; 520252, 3783711; 520223, 3783691; 520193, 3783657; 520165, 3783622; 520137, 3783600; 520111, 3783595; 520096, 3783595; 520079, 3783611; 520071, 3783630; 520074, 3783669; 520100, 3783717; 520129, 3783747; 520177, 3783775; 520227, 3783805; 520236, 3783810; 520209, 3783810; 520179, 3783810; 520179, 3783840; 520209, 3783840; 520239, 3783840; 520269, 3783840; 520282, 3783840; 520299, 3783855; 520299, 3783870; 520315, 3783870; 520320, 3783874; 520329, 3783880; 520329, 3783900; 520348, 3783900; 520349, 3783901; 520359, 3783908; 520359, 3783930; 520389, 3783930; 520391, 3783930; 520412, 3783942; 520419, 3783945; 520419, 3783960; 520419, 3783990; 520419, 3784020; 520449, 3784020; 520449, 3783990; 520449, 3783960; 520453, 3783960; 520479, 3783974; 520479, 3783990; 520505, 3783990; 520526, 3784004; 520539, 3784013; 520539, 3784020; 520549, 3784020; 520569, 3784034; 520569, 3784050; 520597, 3784050; 520600, 3784052; 520629, 3784069; 520629, 3784080; 520653, 3784080; 520659, 3784082; 520659, 3784110; 520659, 3784140; 520689, 3784140; 520689, 3784110; 520710, 3784110; 520717, 3784114; 520719, 3784116; 520719, 3784140; 520749, 3784140; 520753, 3784140; 520754, 3784141; 520777, 3784155; 520779, 3784155; 520779, 3784170; 520809, 3784170; 520813, 3784170; 520839, 3784182; 520839, 3784200; 520869, 3784200; 520869, 3784230; 520869, 3784260; 520869, 3784290; 520899, 3784290; 520929, 3784290; 520929, 3784260; 520953, 3784260; 520957, 3784264; 520959, 3784265; 520959, 3784290; 520989, 3784290; 521006, 3784290; 521006, 3784290; 521019, 3784298; 521019, 3784320; 521019, 3784350;521049, 3784350; 521079, 3784350; 521079, 3784380; 521109, 3784380; 521139, 3784380; 521139, 3784410; 521169, 3784410; 521197, 3784410; 521199, 3784411; 521199, 3784440; 521169, 3784440; 521169, 3784470; 521169, 3784500; 521199, 3784500; 521229, 3784500; 521229, 3784470; 521259, 3784470; 521289, 3784470; 521289, 3784500; 521259, 3784500; 521259, 3784530; 521259, 3784560; 521259, 3784564; 521276, 3784574; 521301, 3784590; 521319, 3784590; 521319, 3784603; 521328, 3784609; 521331, 3784612; 521337, 3784615; 521343, 3784618; 521346, 3784620; 521349, 3784620; 521349, 3784621; 521350, 3784622; 521363, 3784627; 521368, 3784629; 521374, 3784631; 521381, 3784632; 521387, 3784633; 521390, 3784634; 521400, 3784635; 521404, 3784635; 521409, 3784635; returning to 521409, 3784620.

(ii) Note: Unit 10 for *Taraxacum californicum* is depicted on the map in paragraph (12)(ii) of this entry.

(15) Unit 11: Cienega Seca Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Onyx Peak, land bounded by the following UTM NAD27 coordinates (E,N): 525819, 3782744; 525865, 3782734; 525901, 3782698; 525995, 3782576; 526043, 3782518; 526081, 3782447; 526074, 3782442; 526069, 3782438; 526064, 3782435; 526058, 3782432; 526050, 3782428; 526050, 3782428; 526044, 3782425; 526038, 3782423; 526032, 3782421; 526025, 3782419; 526019, 3782418; 526012, 3782417; 526006, 3782417; 525999, 3782417; 525998, 3782418; 525972, 3782420; 525967, 3782420; 525961, 3782421; 525954, 3782423; 525948, 3782425; 525942, 3782427; 525936, 3782430; 525930, 3782433; 525925, 3782436; 525919, 3782440; 525916, 3782442; 525915, 3782443; 525914, 3782442; 525914, 3782442; 525914, 3782442; 525900, 3782421; 525897, 3782416; 525892, 3782411; 525888, 3782406; 525884, 3782403; 525881, 3782400; 525879, 3782400; 525849, 3782400; 525819, 3782400; 525819, 3782370; 525789, 3782370; 525759, 3782370; 525759, 3782340; 525737, 3782340; 525733, 3782332; 525729, 3782323; 525729, 3782310; 525729,

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(ii) Note: Unit 11 for *Taraxacum californicum* is depicted on the map in paragraph (12)(ii) of this entry.

(16) Unit 12: South Fork Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Moonridge, land bounded by the following UTM NAD27 coordinates (E,N): 514285, 3775859; 514256, 3775878; 514234, 3775891; 514215, 3775891; 514206, 3775893; 514194, 3775933; 514194, 3775971; 514201, 3775992; 514203, 3775992; 514234, 3776002; 514260, 3776015; 514288, 3776030; 514301, 3776045; 514298, 3776087; 514316, 3776131; 514337, 3776179; 514377, 3776210; 514397, 3776207; 514406, 3776215; 514428, 3776246; 514447, 3776272; 514469, 3776342; 514479, 3776377; 514485, 3776392; 514494, 3776392; 514489, 3776412; 514495, 3776489; 514483, 3776577; 514469, 3776633; 514469, 3776716; 514448, 3776804; 514416, 3776866; 514410, 3776934; 514357, 3776975; 514321, 3777040; 514280, 3777087; 514261, 3777109; 514255, 3777108; 514239, 3777118; 514229, 3777134; 514214, 3777153; 514204, 3777175; 514191, 3777200; 514172, 3777216; 514147, 3777229; 514139, 3777237; 514134, 3777242; 514137, 3777270; 514163, 3777305; 514169, 3777324; 514176, 3777353; 514198, 3777381; 514204, 3777413; 514204, 3777448; 514204, 3777473; 514137, 3777515; 514090, 3777521; 514087, 3777521; 514055, 3777521; 514010, 3777531; 513975, 3777556; 513956, 3777585; 513931, 3777635; 513918, 3777674; 513883, 3777743; 513852, 3777762; 513817, 3777797; 513801, 3777820; 513810, 3777848; 513829, 3777861; 513858, 3777877; 513871, 3777902; 513877, 3777908; 513925, 3777902; 513944, 3777915; 513945, 3777913; 513947, 3777915; 513975, 3777928; 514008, 3777938; 514063, 3777951; 514076, 3777947; 514080, 3777959; 514093, 3777972; 514099, 3778013; 514112, 3778016; 514122, 3777985; 514122, 3777956; 514131, 3777934; 514137, 3777918; 514141, 3777893; 514150, 3777854; 514150, 3777823; 514150, 3777797; 514150, 3777759; 514141, 3777731; 514134, 3777702; 514139, 3777681; 514152, 3777678; 514177, 3777666; 514185, 3777630; 514190, 3777594; 514195, 3777585; 514207, 3777553; 514229, 3777518; 514255, 3777483; 514268, 3777454; 514280, 3777423; 514283, 3777388; 514306, 3777346; 514325, 3777299; 514353, 3777264; 514369, 3777239; 514379, 3777207; 514385, 3777178; 514388, 3777161; 514392, 3777152; 514439, 3777087; 514469, 3777048; 514522, 3776992; 514584, 3776910; 514589, 3776842; 514595, 3776772; 514634, 3776660; 514631, 3776574; 514642, 3776512; 514645, 3776451; 514672, 3776380; 514671, 3776375; 514731, 3776327; 514781, 3776230; 514834, 3776138; 514854, 3776094; 514853, 3776077; 514848, 3776039; 514846, 3776032; 514796, 3776029; 514772, 3776029; 514742, 3776035; 514715, 3776046; 514698, 3776065; 514681, 3776075; 514675, 3776087; 514653, 3776103; 514637, 3776106; 514616, 3776079; 514610, 3776058; 514590, 3776033; 514589, 3776018; 514580, 3776005; 514571, 3775974; 514538, 3775945; 514509, 3775926; 514476, 3775916; 514438, 3775898; 514405, 3775889; 514392, 3775878; 514372, 3775876; 514368, 3775869; 514352, 3775859; 514350, 3775858; 514287, 3775858; returning to 514285, 3775859.

(ii) Note: Unit 12 for *Taraxacum californicum* is depicted on the map in paragraph (12)(ii) of this entry.

* * * * *

Family *Poaceae*: *Poa atropurpurea* (San Bernardino bluegrass)

(1) Critical habitat units for this species are depicted for San Diego and San Bernardino Counties, California.

(2) The primary constituent elements of critical habitat for Poa atropurpurea are:

(i) Wet meadows subject to flooding during wet years in the San Bernardino Mountains in San Bernardino County at elevations of 6,700 to 8,100 feet (2,000 to 2,469 meters), and in the Laguna and Palomar Mountains of San Diego County at elevations of 6,000 to 7,500 feet (1,800 to 2,300 meters), that provide space for individual and population growth, reproduction, and dispersal; and

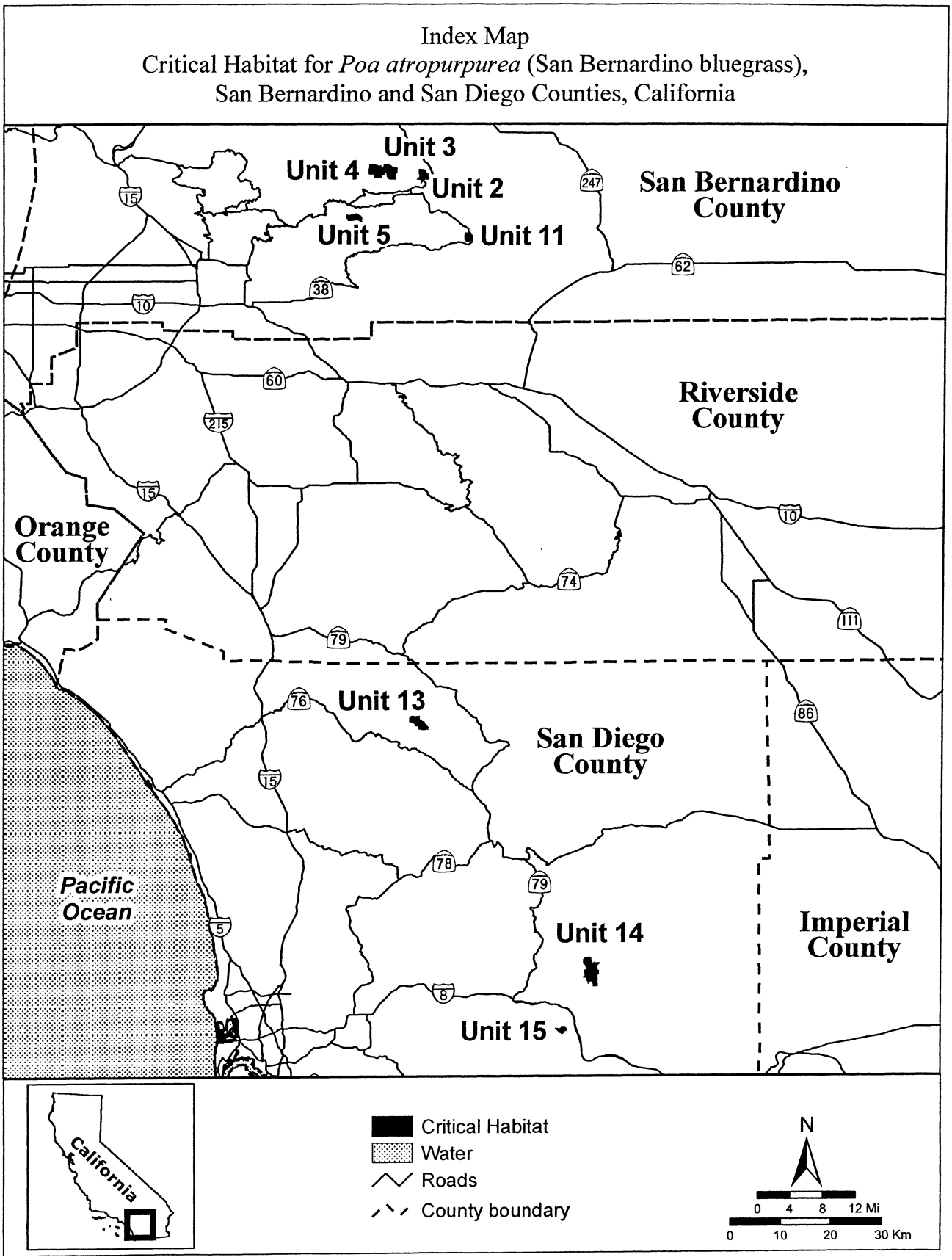
(ii) Well-drained, loamy alluvial to sandy loam soils occurring in the wet meadow system, with a 0 to 16 percent slope, to provide water, air, minerals, and other nutritional or physiological requirements to the species.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Data layers defining map units were created on a base of USGS 1:24,0000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) Note: Index map of critical habitat units for *Poa atropurpurea* (San Bernardino bluegrass) follows:

BILLING CODE 4310–55-S




BILLING CODE 4310–55–C

(6) Unit 2: North Baldwin Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Big Bear City, land bounded by the following UTM NAD27 coordinates (E,N): 516578, 3795213; 516595, 3795205; 516597, 3795204; 516602, 3795201; 516608, 3795198; 516613, 3795194; 516618, 3795190; 516623, 3795185; 516628, 3795181; 516632, 3795176; 516632, 3795175; 516639, 3795166; 516642, 3795161; 516646, 3795156; 516649, 3795150; 516652, 3795144; 516654, 3795138; 516656, 3795132; 516656, 3795131; 516659, 3795122; 516660, 3795116; 516661, 3795109; 516661, 3795108; 516662, 3795107; 516668, 3795104; 516674, 3795101; 516680, 3795098; 516685, 3795094; 516690, 3795090; 516695, 3795085; 516699, 3795081; 516703, 3795076; 516707, 3795070; 516711, 3795065; 516714, 3795059; 516716, 3795053; 516719, 3795047; 516721, 3795041; 516722, 3795034; 516723, 3795028; 516724, 3795021; 516724, 3795015; 516724, 3795008; 516723, 3795002; 516723, 3795000; 516725, 3794999; 516731, 3794997; 516736, 3794994; 516742, 3794990; 516747, 3794986; 516752, 3794982; 516756, 3794979; 516759, 3794976; 516760, 3794975; 516765, 3794970; 516769, 3794965; 516773, 3794960; 516773, 3794958; 516776, 3794956; 516781, 3794952; 516786, 3794947; 516791, 3794943; 516795, 3794938; 516799, 3794932; 516802, 3794927; 516805, 3794921; 516808, 3794915; 516810, 3794909; 516812, 3794903; 516813, 3794896; 516815, 3794890; 516815, 3794883; 516815, 3794877; 516815, 3794870; 516815, 3794864; 516813, 3794857; 516812, 3794851; 516810, 3794845; 516808, 3794838; 516805, 3794833; 516802, 3794827; 516799, 3794821; 516795, 3794816; 516791, 3794811; 516786, 3794806; 516783, 3794803; 516761, 3794782; 516759, 3794781; 516754, 3794777; 516748, 3794773; 516743, 3794769; 516737, 3794766; 516734, 3794765; 516730, 3794762; 516725, 3794757; 516721, 3794754; 516704, 3794743; 516703, 3794742; 516698, 3794739; 516692, 3794736; 516686, 3794733; 516680, 3794731; 516674, 3794729; 516667, 3794727; 516663, 3794727; 516657, 3794723; 516657, 3794722; 516657, 3794721; 516655, 3794711; 516655, 3794697; 516660, 3794678; 516661, 3794675; 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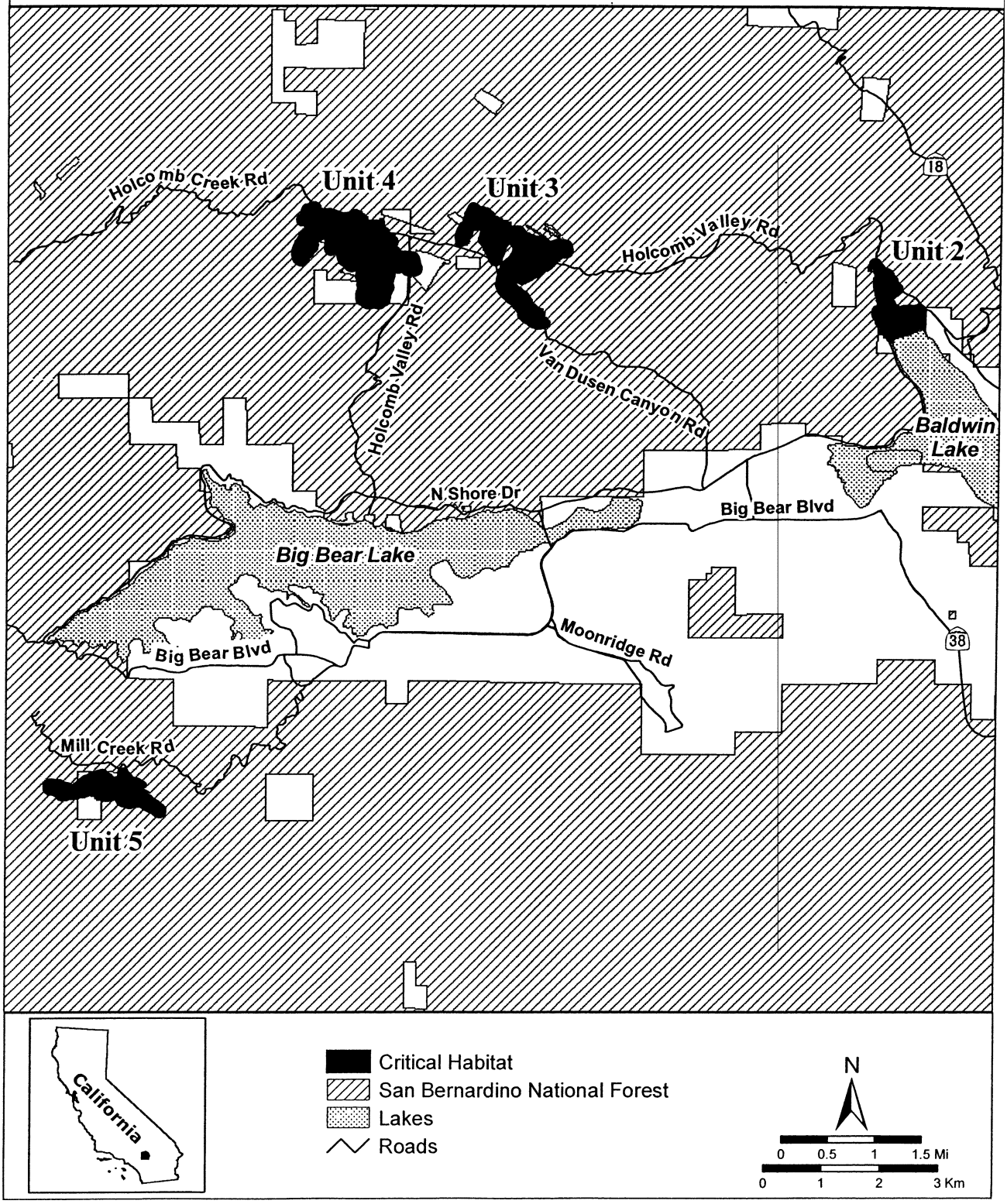
(ii) Note: Map of Units 2, 3, 4, and 5 for *Poa atropurpurea* follows:

**BILLING CODE 4310–55-S**

Critical Habitat for *Poa atropurpurea* (San Bernardino bluegrass), Units 2, 3, 4, and 5, San Bernardino County, California




BILLING CODE 4310–55–C

(7) Unit 3: Belleville Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Fawnskin, land bounded by the following UTM NAD27 coordinates (E,N): 509560, 3796268; 509577, 3796255; 509585, 3796255; 509587, 3796256; 509594, 3796255; 509600, 3796255; 509604, 3796254; 509609, 3796253; 509637, 3796250; 509637, 3796250; 509644, 3796249; 509650, 3796247; 509657, 3796245; 509659, 3796244; 509672, 3796239; 509687, 3796236; 509693, 3796235; 509699, 3796233; 509705, 3796231; 509711, 3796228; 509717, 3796225; 509722, 3796222; 509728, 3796218; 509732, 3796215; 509748, 3796201; 509749, 3796200; 509751, 3796198; 509768, 3796182; 509772, 3796179; 509773, 3796178; 509776, 3796175; 509796, 3796156; 509797, 3796155; 509802, 3796150; 509806, 3796145; 509809, 3796140; 509813, 3796134; 509816, 3796128; 509819, 3796122; 509821, 3796116; 509823, 3796110; 509824, 3796104; 509825, 3796102; 509826, 3796096; 509828, 3796096; 509835, 3796095; 509841, 3796094; 509848, 3796093; 509854, 3796091; 509860, 3796089; 509861, 3796088; 509878, 3796081; 509884, 3796078; 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(ii) Note: Unit 3 for *Poa atropurpurea* is depicted on the map in paragraph (6)(ii) of this entry.

(8) Unit 4: Hitchcock Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Fawnskin, land bounded by the following UTM NAD27 coordinates (E,N): 507473, 3794979; 507468, 3794984; 507464, 3794989; 507460, 3794994; 507459, 3794996; 507457, 3794999; 507456, 3795000; 507454, 3795005; 507452, 3795007; 507444, 3795025; 507443, 3795029; 507440, 3795035; 507440, 3795037; 507438, 3795041; 507437, 3795048; 507436, 3795054; 507435, 3795061; 507435, 3795067; 507435, 3795074; 507436, 3795080; 507437, 3795087; 507437, 3795088; 507443, 3795114; 507444, 3795119; 507446, 3795126; 507448, 3795132; 507451, 3795138; 507454, 3795144; 507455, 3795144; 507455, 3795150; 507455, 3795152; 507455, 3795154; 507455, 3795155; 507449, 3795159; 507448, 3795158; 507442, 3795156; 507441, 3795156; 507438, 3795156; 507429, 3795153; 507424, 3795151; 507421, 3795149; 507420, 3795148; 507419, 3795148; 507413, 3795145; 507407, 3795143; 507400, 3795141; 507394, 3795139; 507388, 3795138; 507381, 3795138; 507375, 3795137; 507368, 3795138; 507361, 3795138; 507355, 3795139; 507349, 3795141; 507342, 3795143; 507338, 3795144; 507309, 3795156; 507307, 3795156; 507301, 3795159; 507296, 3795162; 507290, 3795166; 507285, 3795169; 507280, 3795174; 507275, 3795178; 507270, 3795183; 507266, 3795188; 507264, 3795191; 507255, 3795204; 507254, 3795206; 507253, 3795206; 507250, 3795211; 507247, 3795217; 507246, 3795219; 507244, 3795223; 507244, 3795223; 507239, 3795237; 507234, 3795238; 507227, 3795240; 507221, 3795242; 507215, 3795244; 507209, 3795247; 507203, 3795250; 507198, 3795253; 507194, 3795255; 507185, 3795262; 507183, 3795264; 507178, 3795268; 507173, 3795272; 507169, 3795277; 507165, 3795282; 507161, 3795287; 507157, 3795293; 507154, 3795299; 507151, 3795305; 507149, 3795311; 507147, 3795317; 507146, 3795323; 507145, 3795330; 507144, 3795336; 507144, 3795340; 507141, 3795344; 507138, 3795349; 507135, 3795355; 507132, 3795361; 507130, 3795367; 507128, 3795374; 507127, 3795380; 507125, 3795386; 507125, 3795393; 507125, 3795398; 507124, 3795410; 507122, 3795423; 507122, 3795427; 507121, 3795430; 507119, 3795453; 507119, 3795456; 507119, 3795463; 507119, 3795470; 507119, 3795471; 507116, 3795469; 507107, 3795464; 507107, 3795463; 507103, 3795459; 507098, 3795454; 507093, 3795450; 507088, 3795446; 507088, 3795446; 507081, 3795442; 507076, 3795439; 507070, 3795436; 507066, 3795434; 507066, 3795433; 507060, 3795431; 507054, 3795428; 507047, 3795426; 507041, 3795425; 507035, 3795424; 507028, 3795423; 507021, 3795423; 507013, 3795423; 507008, 3795423; 506989, 3795428; 506970, 3795437; 506953, 3795449; 506938, 3795464; 506926, 3795481; 506918, 3795500; 506912, 3795520; 506912, 3795522; 506909, 3795539; 506909, 3795541; 506906, 3795565; 506908, 3795573; 506908, 3795574; 506910, 3795581; 506912, 3795587; 506915, 3795593; 506916, 3795596; 506915, 3795599; 506914, 3795606; 506913, 3795612; 506912, 3795619; 506912, 3795625; 506912, 3795632; 506912, 3795634; 506914, 3795650; 506915, 3795663; 506915, 3795667; 506916, 3795673; 506918, 3795679; 506920, 3795686; 506922, 3795690; 506922, 3795691; 506916, 3795694; 506911, 3795698; 506909, 3795699; 506905, 3795702; 506891, 3795696; 506867, 3795682; 506855, 3795669; 506850, 3795664; 506847, 3795660; 506829, 3795660; 506799, 3795660; 506799, 3795669; 506797, 3795670; 506782, 3795676; 506781, 3795666; 506779, 3795650; 506780, 3795649; 506782, 3795647; 506794, 3795631; 506794, 3795630; 506799, 3795630; 506799, 3795623; 506801, 3795619; 506809, 3795602; 506805, 3795585; 506801, 3795570; 506797, 3795554; 506797, 3795553; 506797,

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(ii) Note: Unit 4 for *Poa atropurpurea* is depicted on the map in paragraph (6)(ii) of this entry.

(9) Unit 5: Bluff Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Big Bear Lake, land bounded by the following UTM NAD27 coordinates (E,N): 502768, 3786471; 502770, 3786472; 502816, 3786510; 502819, 3786513; 502824, 3786517; 502830,

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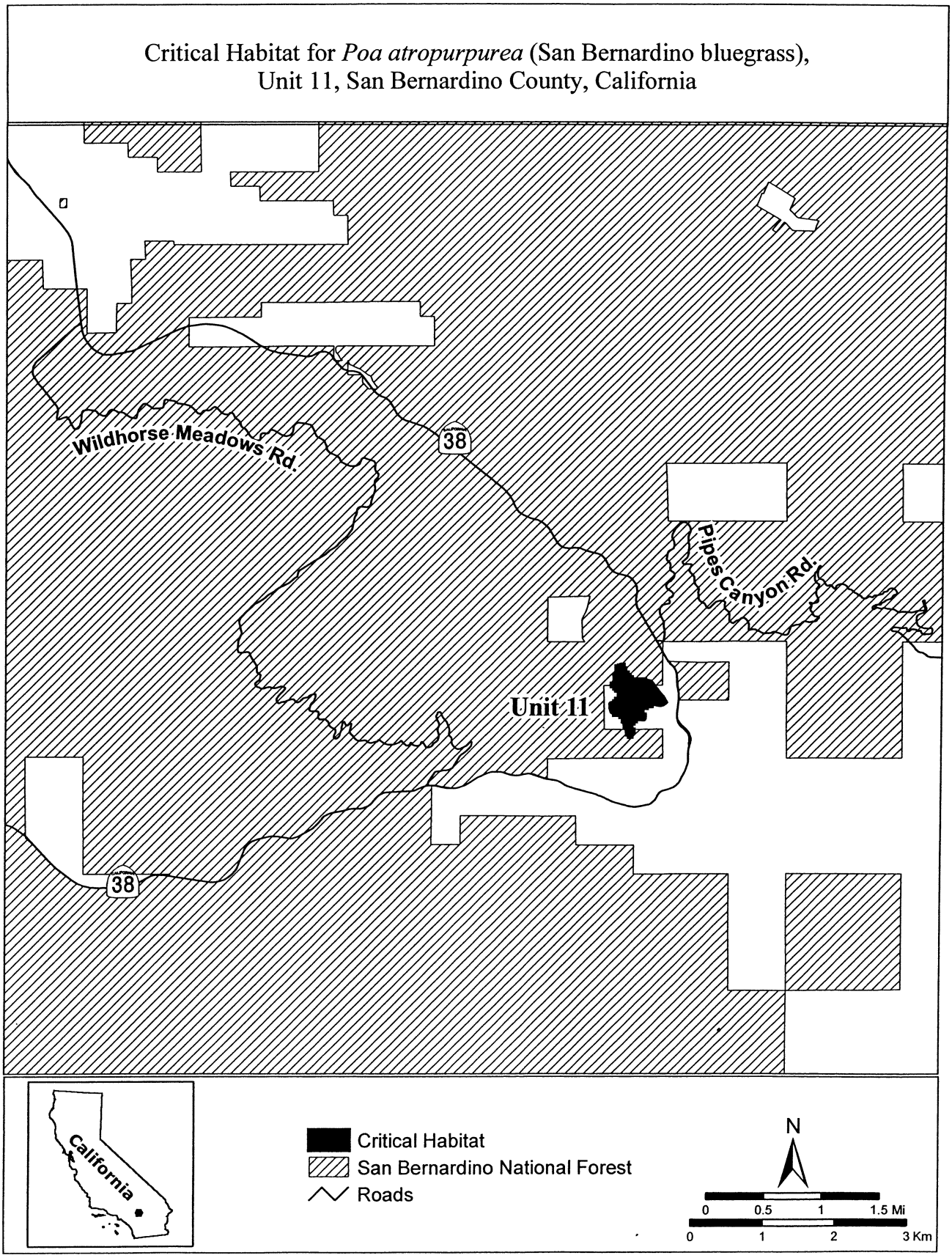
(ii) Note: Unit 5 for *Poa atropurpurea* is depicted on the map in paragraph (6)(ii) of this entry.

(10) Unit 11: Cienega Seca Meadow, San Bernardino County, California.

(i) From USGS 1:24:000 quadrangle map Onyx Peak, land bounded by the following UTM NAD27 coordinates (E,N): 525819, 3782744; 525865, 3782734; 525901, 3782698; 525995, 3782576; 526043, 3782518; 526081, 3782447; 526074, 3782442; 526069, 3782438; 526064, 3782435; 526058, 3782432; 526050, 3782428; 526050, 3782428; 526044, 3782425; 526038, 3782423; 526032, 3782421; 526025, 3782419; 526019, 3782418; 526012, 3782417; 526006, 3782417; 525999, 3782417; 525998, 3782418; 525972, 3782420; 525967, 3782420; 525961, 3782421; 525954, 3782423; 525948, 3782425; 525942, 3782427; 525936, 3782430; 525930, 3782433; 525925, 3782436; 525919, 3782440; 525916, 3782442; 525915, 3782443; 525914, 3782442; 525914, 3782442; 525914, 3782442; 525900, 3782421; 525897, 3782416; 525892, 3782411; 525888, 3782406; 525884, 3782403; 525881, 3782400; 525879, 3782400; 525849, 3782400; 525819, 3782400; 525819, 3782370; 525789, 3782370; 525759, 3782370; 525759, 3782340; 525737, 3782340; 525733, 3782332; 525729, 3782323; 525729, 3782310; 525729, 3782280; 525759, 3782280; 525789, 3782280; 525789, 3782250; 525789, 3782234; 525777, 3782220; 525759, 3782220; 525729, 3782220; 525699, 3782220; 525669, 3782220; 525669, 3782190; 525639, 3782190; 525639, 3782160; 525609, 3782160; 525609, 3782130; 525609, 3782104; 525609, 3782100; 525609, 3782070; 525639, 3782070; 525639, 3782040; 525609, 3782040; 525609, 3782010; 525609, 3781980; 525579, 3781980; 525579, 3782010; 525549, 3782010; 525549, 3782030; 525547, 3782031; 525545, 3782042; 525545, 3782068; 525534, 3782100; 525519, 3782100; 525519, 3782104; 525519, 3782130; 525519, 3782140; 525514, 3782154; 525507, 3782172; 525501, 3782190; 525489, 3782190; 525489, 3782220; 525489, 3782234; 525488, 3782236; 525481, 3782250; 525459, 3782250; 525459, 3782280; 525429, 3782280; 525399, 3782280; 525369, 3782280; 525369, 3782310; 525341, 3782310; 525339, 3782316; 525339, 3782340; 525329, 3782340; 525324, 3782356; 525323, 3782358; 525321, 3782364; 525320, 3782370; 525319, 3782377; 525318, 3782383; 525318, 3782390; 525318, 3782396; 525319, 3782403; 525319, 3782407; 525322, 3782422; 525322, 3782424; 525324, 3782430; 525339, 3782430; 525369, 3782430; 525369, 3782460; 525399, 3782460; 525399, 3782490; 525429, 3782490; 525429, 3782520; 525429, 3782550; 525429, 3782580; 525429, 3782606; 525420, 3782610; 525399, 3782610; 525399, 3782622; 525388, 3782631; 525381, 3782640; 525369, 3782640; 525369, 3782653; 525348, 3782670; 525339, 3782670; 525339, 3782700; 525349, 3782700; 525350, 3782704; 525351, 3782705; 525359, 3782721; 525369, 3782726; 525369, 3782730; 525369, 3782760; 525369, 3782790; 525369, 3782820; 525379, 3782820; 525388, 3782836; 525399, 3782840; 525399, 3782850; 525429, 3782850; 525429, 3782880; 525399, 3782880; 525399, 3782910; 525399, 3782940; 525429, 3782940; 525429, 3782951; 525434, 3782953; 525438, 3782955; 525445, 3782957; 525451, 3782958; 525457, 3782959; 525464, 3782960; 525467, 3782960; 525489, 3782961; 525489, 3782940; 525489, 3782910; 525519, 3782910; 525519, 3782880; 525519, 3782850; 525549, 3782850; 525549, 3782827; 525553, 3782820; 525579, 3782820; 525579, 3782790; 525609, 3782790; 525609, 3782760; 525639, 3782760; 525669, 3782760; 525699, 3782760; 525699, 3782730; 525729, 3782730; 525759, 3782730; 525759, 3782760; 525789, 3782730; 525803, 3782730; 525816, 3782735; 525819, 3782735; returning to 525819, 3782744.

(ii) Note: Map of Unit 11 for *Poa atropurpurea* follows:

BILLING CODE 4310–55-S



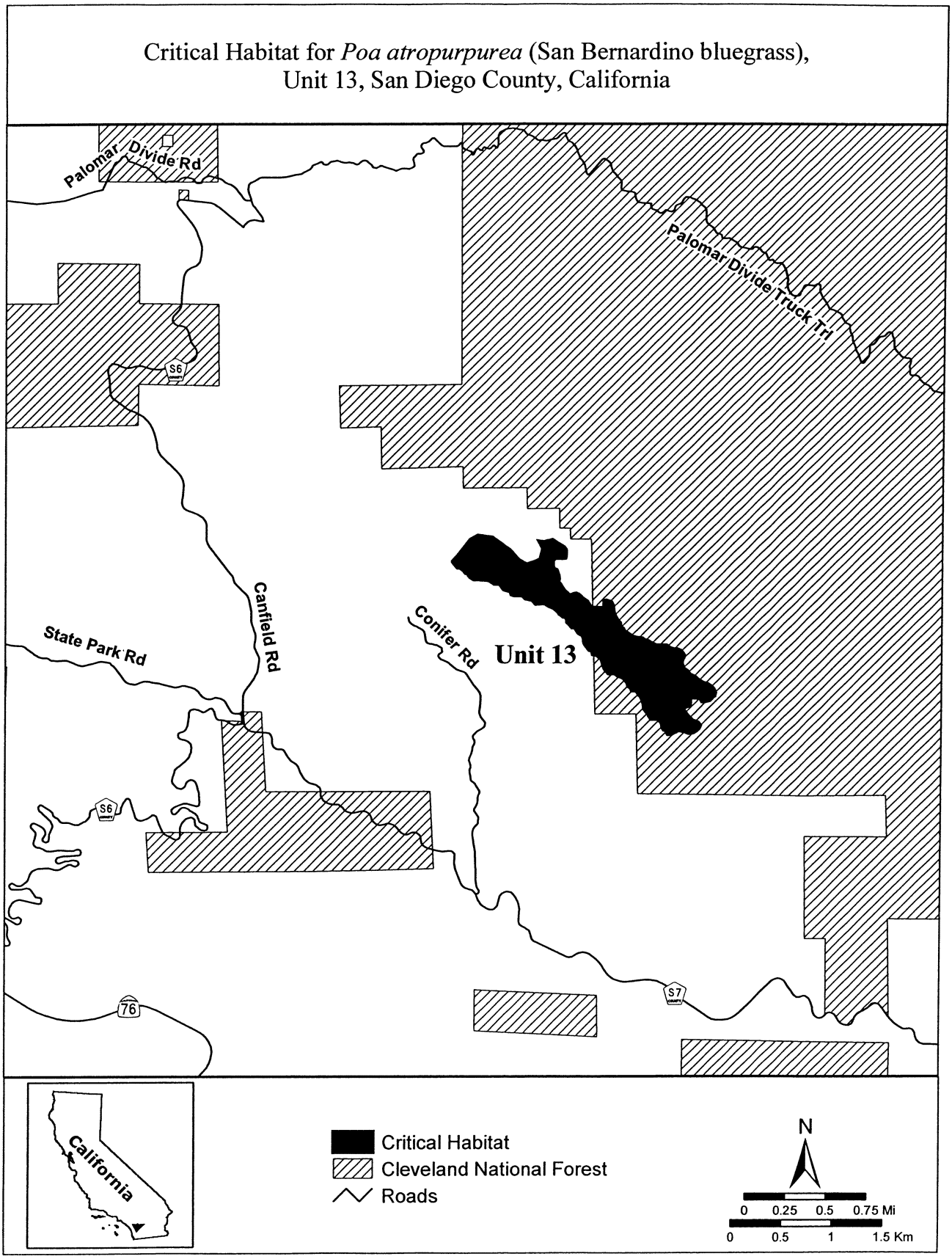

BILLING CODE 4310–55–C

(11) Unit 13: Mendenhall Valley, San Diego County, California.

(i) From USGS 1:24:000 quadrangle map Palomar Observatory, land bounded by the following UTM NAD27 coordinates (E,N): 515708, 3686915; 515693, 3686929; 515679, 3686936; 515639, 3686953; 515612, 3686967; 515609, 3686974; 515604, 3686975; 515576, 3686980; 515505, 3686977; 515476, 3687012; 515443, 3687019; 515407, 3687027; 515376, 3687053; 515352, 3687060; 515331, 3687060; 515293, 3687060; 515267, 3687067; 515257, 3687100; 515229, 3687105; 515195, 3687115; 515164, 3687158; 515138, 3687170; 515097, 3687172; 515074, 3687189; 515047, 3687201; 515009, 3687210; 514971, 3687210; 514935, 3687213; 514897, 3687213; 514871, 3687232; 514850, 3687248; 514840, 3687272; 514821, 3687274; 514802, 3687298; 514783, 3687315; 514754, 3687332; 514740, 3687332; 514706, 3687365; 514699, 3687377; 514708, 3687386; 514700, 3687392; 514745, 3687446; 514869, 3687601; 514935, 3687639; 515076, 3687618; 515174, 3687549; 515245, 3687499; 515333, 3687401; 515388, 3687370; 515422, 3687353; 515498, 3687382; 515553, 3687410; 515579, 3687513; 515546, 3687582; 515593, 3687575; 515619, 3687584; 515646, 3687588; 515670, 3687594; 515709, 3687571; 515734, 3687551; 515777, 3687528; 515799, 3687502; 515799, 3687479; 515799, 3687442; 515794, 3687427; 515764, 3687423; 515743, 3687423; 515704, 3687423; 515674, 3687399; 515672, 3687367; 515672, 3687339; 515689, 3687311; 515709, 3687303; 515717, 3687281; 515728, 3687247; 515732, 3687215; 515726, 3687185; 515747, 3687159; 515754, 3687142; 515786, 3687101; 515820, 3687069; 515843, 3687050; 515879, 3687065; 515908, 3687069; 515927, 3687062; 515948, 3687050; 515963, 3687029; 515987, 3687017; 516018, 3686996; 516032, 3686969; 516051, 3686946; 516080, 3686934; 516120, 3686931; 516156, 3686931; 516187, 3686938; 516192, 3686972; 516203, 3686978; 516199, 3686979; 516193, 3686998; 516208, 3687005; 516253, 3686988; 516270, 3686956; 516274, 3686923; 516281, 3686883; 516298, 3686846; 516315, 3686814; 516341, 3686784; 516347, 3686752; 516375, 3686728; 516377, 3686707; 516427, 3686679; 516465, 3686653; 516499, 3686639; 516528, 3686638; 516563, 3686633; 516590, 3686614; 516623, 3686605; 516637, 3686595; 516664, 3686581; 516680, 3686576; 516702, 3686562; 516718, 3686562; 516742, 3686562; 516768, 3686562; 516799, 3686562; 516838, 3686536; 516857, 3686533; 516878, 3686526; 516909, 3686524; 516938, 3686514; 516959, 3686488; 516976, 3686464; 516959, 3686431; 516950, 3686395; 516959, 3686364; 516959, 3686345; 516983, 3686328; 517009, 3686309; 517026, 3686283; 517059, 3686269; 517085, 3686250; 517107, 3686233; 517126, 3686219; 517152, 3686204; 517178, 3686195; 517217, 3686183; 517243, 3686161; 517264, 3686137; 517281, 3686102; 517274, 3686071; 517254, 3686059; 517248, 3686051; 517228, 3686030; 517188, 3686021; 517155, 3686021; 517140, 3686047; 517104, 3686055; 517065, 3686055; 517035, 3686055; 517033, 3686019; 517033, 3685991; 517018, 3685974; 516978, 3685957; 516973, 3685933; 516995, 3685895; 517025, 3685858; 517057, 3685826; 517114, 3685806; 517133, 3685780; 517119, 3685754; 517097, 3685732; 517069, 3685713; 517021, 3685711; 516992, 3685720; 516942, 3685732; 516919, 3685732; 516902, 3685723; 516873, 3685708; 516854, 3685696; 516818, 3685699; 516804, 3685735; 516780, 3685739; 516771, 3685766; 516761, 3685804; 516737, 3685832; 516714, 3685851; 516690, 3685847; 516656, 3685849; 516637, 3685878; 516630, 3685904; 516613, 3685913; 516594, 3685940; 516587, 3685963; 516580, 3685994; 516575, 3686030; 516556, 3686066; 516530, 3686092; 516511, 3686123; 516468, 3686128; 516461, 3686147; 516435, 3686168; 516428, 3686195; 516408, 3686223; 516380, 3686250; 516327, 3686271; 516292, 3686295; 516237, 3686295; 516196, 3686340; 516182, 3686393; 516169, 3686431; 516159, 3686441; 516116, 3686473; 516079, 3686480; 516073, 3686510; 516070, 3686512; 516041, 3686523; 516020, 3686550; 515996, 3686583; 515991, 3686605; 515989, 3686630; 515977, 3686660; 515969, 3686673; 515956, 3686677; 515939, 3686687; 515917, 3686712; 515908, 3686730; 515891, 3686746; 515868, 3686747; 515849, 3686770; 515835, 3686786; 515823, 3686794; 515818, 3686831; 515808, 3686836; 515797, 3686843; 515775, 3686851; 515753, 3686870; 515742, 3686876; 515732, 3686895; 515712, 3686908; 515710, 3686915; returning to 515708, 3686915.

(ii) Note: Map of Unit 13 for *Poa atropurpurea* follows:

BILLING CODE 4310–55-S




BILLING CODE 4310–55–C

(12) Unit 14: Laguna Meadow, San Diego County, California.

(i) From USGS 1:24:000 quadrangle maps Monument Peak and Mount Laguna, land bounded by the following UTM NAD27 coordinates (E,N): 550585, 3637916; 550626, 3637882; 550683, 3637909; 550739, 3637924; 550799, 3637969; 550859, 3637972; 550904, 3638006; 550934, 3638051; 550961, 3638115; 550938, 3638123; 550897, 3638127; 550885, 3638149; 550912, 3638190; 550934, 3638232; 550968, 3638265; 551032, 3638307; 551062, 3638363; 551084, 3638438; 551080, 3638474; 551057, 3638534; 551033, 3638590; 550998, 3638657; 550955, 3638702; 550940, 3638726; 551024, 3638739; 551056, 3638737; 551075, 3638737; 551119, 3638757; 551126, 3638779; 551144, 3638778; 551161, 3638786; 551173, 3638827; 551189, 3638850; 551199, 3638899; 551208, 3638905; 551219, 3638908; 551226, 3638938; 551260, 3638951; 551294, 3638939; 551335, 3638938; 551356, 3638934; 551383, 3638941; 551394, 3638943; 551386, 3638884; 551370, 3638874; 551362, 3638842; 551365, 3638809; 551371, 3638784; 551386, 3638767; 551400, 3638758; 551421, 3638763; 551434, 3638768; 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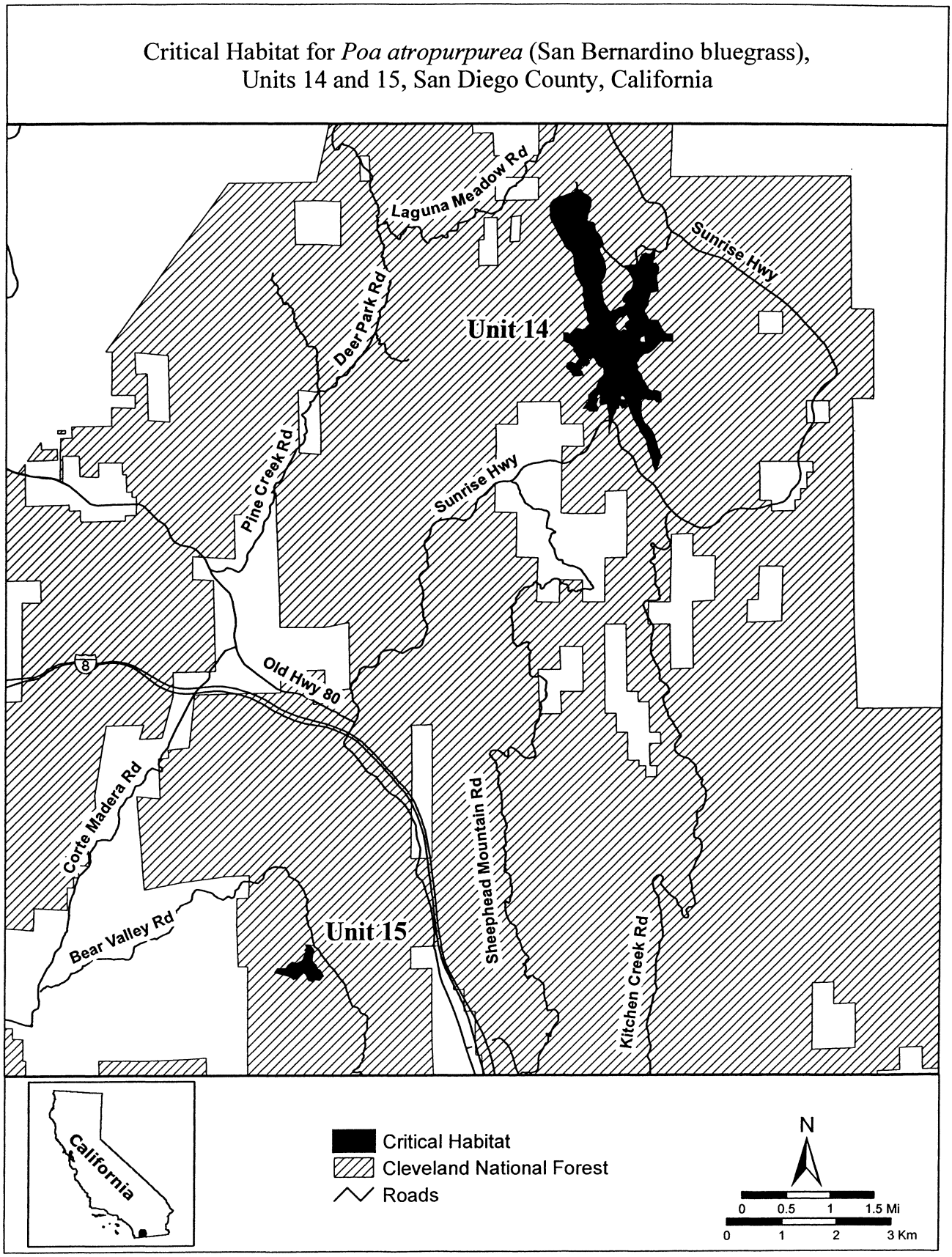
(ii) Note: Map of Units 14 and 15 for *Poa atropurpurea* follows:

BILLING CODE 4310–55-S




BILLING CODE 4310–55–C

(13) Unit 15: Bear Valley, San Diego County, California.

(i) From USGS 1:24:000 quadrangle map Descanso, land bounded by the following UTM NAD27 coordinates (E,N): 545418, 3625880; 545371, 3625830; 545280, 3625844; 545259, 3625803; 545210, 3625820; 545161, 3625920; 545096, 3625970; 545046, 3625966; 545005, 3625906; 544962, 3625866; 544913, 3625851; 544850, 3625899; 544717, 3625930; 544619, 3625958; 544636, 3625980; 544714, 3625980; 544779, 3625982; 544836, 3626047; 544888, 3626090; 544924, 3626087; 544936, 3626066; 544965, 3626075; 545022, 3626099; 545091, 3626130; 545179, 3626331; 545158, 3626348; 545179, 3626376; 545175, 3626404; 545192, 3626405; 545203, 3626378; 545232, 3626357; 545244, 3626326; 545232, 3626285; 545215, 3626152; 545242, 3626090; 545284, 3626066; 545297, 3626049; 545313, 3625982; 545377, 3625954; returning to 545418, 3625880.

(ii) Note: Unit 15 for *Poa atropurpurea* is depicted on the map in paragraph (13)(ii) of this entry.

Dated: July 24, 2008

**David M. Verhey**

*Acting Assistant Secretary for Fish and Wildlife and Parks*

[FR Doc. E8–17522 Filed 8–13–08; 8:45 am]

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Federal Register

Thursday,
August 14, 2008

# Part IV

# Department of Labor

## Employment and Training Administration

**20 CFR Part 641**

**Senior Community Service Employment Program; Notice of Proposed Rulemaking; Proposed Rule**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 641**

**RIN 1205–AB48**

## Senior Community Service Employment Program; Notice of Proposed Rulemaking

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice of proposed rulemaking with request for comments.

**SUMMARY:** The Employment and Training Administration of the Department of Labor (Department) is issuing this Notice of Proposed Rulemaking (NPRM) to propose changes in the Senior Community Service Employment Program resulting from the 2006 Amendments to title V of the Older Americans Act, and to clarify various policies. Key proposed changes include the introduction of a 48-month limit on participation, regular competition for national grants, and an available increase in the proportion of grant funds that can be used for participant training and supportive services. Comments on this proposed rule are welcome according to the dates listed below.

**DATES:** Interested persons are invited to submit comments on this proposed rule. To ensure consideration, comments must be received on or before October 14, 2008. Comments received after that date will be considered to the extent possible. Comments should be limited to the proposed changes and additions to the current regulations, all of which are discussed in the preamble to this NPRM, or to other changes to the current regulations which flow from the 2006 Amendments.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB48, by either of the following methods:

- *Federal e-Rulemaking Portal: www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *Mail and hand delivery/courier:* Written comments, disk, and CD–Rom submissions may be mailed to Thomas M. Dowd, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.

*Instructions:* Label all submissions with RIN 1205–AB48.

Please be advised that the Department will post all comments received on *www.regulations.gov* without making any change to the comments, or redacting any information. The *www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. Therefore, the Department recommends that commenters safeguard any personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses included in their comments as such may become easily available to the public via the *www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information.

Also, please note that due to security concerns, postal mail delivery in Washington, DC, may be delayed. Therefore, the Department encourages the public to submit comments via the Internet as indicated above.

*Docket:* The Department will make all the comments it receives available for public inspection during normal business hours at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and electronic file on computer disk. The Department will consider providing the rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternative format, contact the Office of Policy Development and Research at (202) 693–3700 (not a toll-free number). You may also contact this office at the address listed above.

**FOR FURTHER INFORMATION CONTACT:** Sherril Hurd, Acting Team Leader, Regulations Unit, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210; telephone (202) 693–3700 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** The preamble to this proposed rule is organized as follows:



### I. Background

On October 17, 2006, President Bush signed the Older Americans Act (OAA) Amendments of 2006, Public Law 109–365 (2006 OAA). This law amended the statute authorizing SCSEP and necessitates changes to the SCSEP regulations. The Department's Employment and Training Administration (ETA) promulgated an IFR on June 29, 2007 that implemented changes in the SCSEP performance measurement system required by the 2006 OAA. This proposed rule proposes to implement the remainder of the changes in the SCSEP necessitated by the 2006 OAA, and to clarify various program policies.

The SCSEP, authorized by title V of the OAA, is the only Federally-sponsored employment and training program targeted specifically to low-income older individuals who want to enter or re-enter the workforce. Participants must be unemployed, 55 years of age or older, and have incomes no more than 125 percent of the Federal poverty level. The program offers participants training at community service employment assignments in public and non-profit agencies. The goals of the program are to move SCSEP participants into unsubsidized employment so that they can achieve economic self-sufficiency, and to promote useful opportunities in community service activities. In the 2006 OAA, Congress expressed its sense of the benefits of the SCSEP, stating, ''placing older individuals in community service positions strengthens the ability of the individuals to become self-sufficient, provides much-needed support to organizations that benefit from increased civic engagement, and strengthens the communities that are served by such organizations.'' OAA section 516(2).

Many of the policy initiatives contained in the 2000 OAA, Public Law 106–501, and reflected in the 2004 SCSEP final rule, 69 FR 19014, Apr. 19, 2004, are maintained in the 2006 OAA and this proposed rule. Other policies are amplified. Most notably, there is a greater emphasis on placing individuals in unsubsidized employment, as evidenced by the new 48-month limitation on participation in the SCSEP (OAA sec. 518(a)(3)(B); § 641.570 of this part); the new limitations on benefits (OAA sec. 502(c)(6)(A)(i); § 641.565 of this part); and the increase in available funds for training and supportive services to prepare participants for the unsubsidized workforce (OAA sec. 502(c)(6)(C); § 641.874 of this part). A focus on the transition of participants

into unsubsidized employment allows more eligible individuals to be served by the SCSEP and thus to potentially benefit from employment opportunities and income gains.

Coordination between the SCSEP and the programs under the Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 *et seq.*, continues to be an important objective of the 2006 OAA. With the enactment of WIA in 1998, the SCSEP became a required partner in the workforce investment system. 29 U.S.C. 2841(b)(1)(B)(vi). In 2000, Congress amended the SCSEP to require coordination with the WIA One-Stop Delivery System (Pub. L. 106–501 sec. 505(c)(1)), including reciprocal use of assessment mechanisms and Individual Employment Plans (Pub. L. 106–501 sec. 502(b)(4)). The underlying notion of the One-Stop Delivery System is the coordination of programs, services, and governance structures, so that the customer has access to a seamless system of workforce investment services.

Consistent with current SCSEP practice, both WIA and the 2006 OAA require any grantee operating a SCSEP project in a local area to negotiate a Memorandum of Understanding (MOU) with the Local Workforce Investment Board. WIA section 121; OAA section 511(b); see also OAA section 502(b)(1)(O). The MOU must detail the SCSEP project's involvement in the One-Stop Delivery System. In particular, SCSEP grantees/sub-recipients must make arrangements to provide their participants, eligible individuals the grantees are unable to serve, as well as SCSEP-ineligible individuals, with access to services available in the One-Stop Centers. OAA secs. 510, 511; §§ 641.210, 641.220 of this part.

Because the SCSEP is a required partner under WIA, SCSEP grantees and sub-recipients must ensure that they are familiar with WIA's statutory and regulatory provisions. Congress is considering legislation to reauthorize WIA, and reauthorization may bring changes to the law. SCSEP grantees and sub-recipients must ensure that they keep current on any changes in WIA law that could impact their program.

The 2006 OAA also increases the accountability of grantees by clearly requiring a competitive process for grant awards. This proposed rule implements the statute's requirement that the national SCSEP grants be re-competed regularly, generally every four years. OAA section 514(a); § 641.490(a) of this part. This proposed rule also implements the statute's requirement that a State compete its SCSEP grant if the current State grantee fails to meet its core performance goals for three consecutive years. OAA sec. 513(d)(3)(B)(iii); § 641.490(b) of this part.

In addition, the 2006 OAA establishes new funding opportunities for pilot, demonstration, and evaluation projects (OAA sec. 502(e); § 641.600–640 of this part), expands the priority-for-service categories (OAA sec. 518(b); § 641.520 of this part), and modifies how the program determines income eligibility (OAA sec. 518(3)(A); § 641.510 of this part).

To the extent that the 2006 OAA does not change the 2000 OAA, these proposed regulations do not change the statutory interpretations or policy positions that supported the current regulations. The SCSEP is an established program; we do not propose to begin anew with this proposed rule but rather build upon the regulatory framework that has developed over the years. The proposed changes, mostly necessitated by statutory revisions, are discussed further in the next section of the preamble.

The Department notes that it will continue to use the name ''Senior Community Service Employment Program'' for this program, although the OAA refers to it in various terms.

The Department solicits comments on this proposed rule. For ease of reading, the Department is publishing the full regulatory text for subparts B–F, H and I. The regulatory text that was amended in the IFR, which includes all of subpart G and some definitions in subpart A, is not reprinted here. With the exception of § 641.140 (definitions), the regulatory text herein includes the proposed changes as well as the several provisions that are unchanged. We are not reprinting unchanged definitions. The Department solicits comments on the proposed changes in this notice. We particularly invite comments, in accordance with the requirements of section 514(f) of the 2006 OAA, addressing any concerns that these proposed regulations significantly compromise the ability of grantees to serve their targeted populations of minority older individuals, in areas where substantial populations of minority individuals reside.

## II. Section-by-Section Review of the Proposed Rule

This proposed rule amends subparts A–F, H, and I of part 641 of Title 20 of the Code of Federal Regulations. It proposes changes required by the 2006 OAA, and proposes to clarify various policies. The Department previously promulgated an IFR, 72 FR 35832, June 29, 2007, which addressed changes in the SCSEP performance measurement system required by the 2006 OAA. The IFR revised subpart G, which addresses performance accountability, and added several definitions to, and revised certain definitions within, subpart A that relate to the performance measures. The amendments that were contained in the IFR are not repeated here.

The Department proposes to make two changes that affect many of the subparts. We now refer to sub-recipients along with grantees where the responsibility or requirement being discussed applies to not just the grantees, but their sub-recipients as well. We also change from the term ''community service assignment'' to ''community service employment assignment'' throughout this part to be consistent with a similar change in the language of the statute (see, e.g., OAA section 502(b)(1)(A)), and to emphasize the SCSEP's goal of employment in addition to community service (OAA sec. 502(a)(1)). By including ''employment'' in the phrase ''community service employment assignment,'' the Department does not mean that participants have a right to long-term employment under the SCSEP, however. The SCSEP provides temporary, subsidized, part-time employment assignments to prepare older workers for unsubsidized employment as well as to provide valuable community services.

*Subpart A—Purpose and Definitions*

What Does This Part Cover? (§ 641.100)

Section 641.100 provides an overview of each subpart of the SCSEP regulations. As reflected in paragraph (c) the Department proposes to change the name of the State Plan, and to include a reference to the Plan's four-year strategy, both in accordance with the 2006 OAA and as further described in the preamble for subpart C, below. We propose to add a phrase to the description of subpart D to clarify that subpart D contains provisions relating to the grant application and responsibility review requirements for ''the Department's award of SCSEP funds for State and National grants.'' Subpart D does not apply to the pilot, demonstration, and evaluation grants described in subpart F. As is the case in the current regulations, proposed subpart F contains its own provision about applying for those grants (see § 641.620).

The Department proposes to revise paragraph (f) of the overview to indicate that subpart F provides the rules for pilot, demonstration, and evaluation projects as provided at section 502(e) of

the 2006 OAA. These projects replace the private sector training projects that were authorized under section 502(e) of the 2000 OAA, Public Law 106–501. In paragraph (g) we propose to replace the reference to sanctions with a reference to corrective actions for failure to meet core performance measures, to mirror the language of the 2006 OAA (see, e.g., OAA section 513(d)). Finally, in paragraph (h), we describe subpart H as concerning the administrative requirements for SCSEP ''funds'' rather than SCSEP ''grants'' because many of the requirements contained in subpart H are not limited to grantees.

What Is the SCSEP? (§ 641.110)

This section briefly describes the SCSEP. We propose to add the word ''unemployed'' to the description of individuals served to more thoroughly describe the program. In the past, grantees and applicants/participants have asked whether a person has to be unemployed to be eligible for the SCSEP. Unemployed is—and has been—an eligibility requirement. Also, whereas in the current regulations the program description speaks of ''placing'' participants in ''community service positions,'' the Department now proposes to state that the SCSEP ''trains'' participants in ''community service employment assignments.'' And, whereas the current regulations state that the SCSEP serves participants by ''assisting them to transition to unsubsidized employment,'' we propose to clarify that the SCSEP serves participants by ''assisting them in developing skills and experience to facilitate their transition to unsubsidized employment.'' We propose this change to provide more specificity about the services the SCSEP provides and how these services advance the goal of unsubsidized employment.

What Are the Purposes of the SCSEP? (§ 641.120)

This section describes the purposes of the SCSEP, and is based on the statement establishing the program in section 502(a)(1) of the OAA. The Department proposes to revise this section in accordance with changes in the 2006 OAA, which rearranges the ordering of the purposes. In the 2006 OAA, ''foster[ing] individual economic self-sufficiency'' is listed first among the purposes of the SCSEP; fostering and promoting useful community service activities was listed first in the 2000 OAA. We propose to amend our description accordingly. The Department interprets the placement of this purpose at the front of the list of purposes as consistent with an increased focus on placing participants in unsubsidized employment.

We also propose to alter the statement of the goal concerning community service. The current regulations state that a purpose of the SCSEP is to ''foster and promote useful part-time opportunities in community service activities.'' We propose to change this to: ''Promote useful part-time opportunities in community service employment assignments.'' We omit the word ''foster'' from this phrase to be consistent with the language of the statute. Our use of the term community service employment assignment was discussed above, and is changed consistently in the rest of this proposed rule.

What Is the Scope of This Part? (§ 641.130)

The proposed change in this section concerns administrative issuances. The current regulations indicate that administrative guidance and information will be provided via ''SCSEP Bulletins, technical assistance guides, and other SCSEP directives.'' We propose to revise this section to reflect the current ETA advisory system. We now issue administrative guidance and information for the SCSEP through Training and Employment Guidance Letters (TEGLs), Training and Employment Notices (TENs), technical assistance guides, and other SCSEP guidance. The Department no longer uses Older Worker Bulletins to issue administrative guidance; however, previously issued Bulletins that have not been rescinded, and have not been superseded by the 2006 OAA, are still in effect. All valid administrative issuances, as well as an abundance of other program information, may be viewed at the SCSEP Web site, *http://www.doleta.gov/seniors*.

What Definitions Apply to This Part? (§ 641.140)

The Department proposes to amend several SCSEP definitions.

New Definitions

We propose to add the following five definitions:

*Pacific Island and Asian Americans:* The Department adds the definition of Pacific Island and Asian Americans that appears in section 518(a)(5) of the 2006 OAA.

*Program operator:* We move the definition of ''first tier sub-recipient'' from § 641.856 to the definitions section, rename it ''program operators,'' and expand it to make clear that it applies to all entities that operate a SCSEP program, not just to those entities that receive their funds directly from the grantee. Our intent is to clarify that all entities operating a SCSEP program, and not just those one tier down from direct SCSEP grantees, must adhere to program laws and regulations such as the requirement to track, record, and report administrative costs, and must limit those costs to comply with the administrative costs cap.

*Secretary:* We clarify that Secretary means the Secretary of the Department of Labor.

*Supportive services:* Section 518(a)(7) of the 2006 OAA defines supportive services and we adopt the statutory definition here.

*Unemployed:* We adopt the definition from section 518(a)(8) of the 2006 OAA.

Revised Definitions

We propose to revise the following definitions:

*Authorized position level:* We remove the sentence that appears at the end of the definition in the current regulations, which states that the authorized position level is calculated by dividing a grantee's total award by the national unit cost, because it is repetitive of other language in the definition.

*Community service:* We revise the definition of community service to align more precisely with the statutory definition. We omit the opening phrase, ''includes, but is not limited to,'' and replace it with a provision at the end of the definition allowing the Secretary to include in the definition other services by rule as appropriate. In addition, we have included a lettered listing of the 2006 OAA's grouping of services.

*Equitable distribution report:* In the phrase, ''taking the needs of underserved counties into account,'' we replace the word ''counties'' with ''jurisdictions'' to be inclusive of entities other than counties, such as incorporated cities, which may also be underserved.

*Grantee:* We alter the list of possible entities that may serve as grantees to more closely follow the language of the 2006 OAA at section 502(b)(1). Accordingly, whereas the current regulations list both ''States'' and ''agencies of a State government'' as possible grantees, we now list only ''State agencies.'' Also, the 2006 OAA dropped language indicating that political subdivisions of a State, or a combination of such political subdivisions, could serve as a grantee; we therefore delete such language from this definition. We also modify the definition of grantee to eliminate the reference to section 502(e) grantees, since private sector training projects are

no longer authorized, and to make technical corrections.

*Greatest economic need:* We update the citation for this definition.

*Greatest social need:* We alter the definition of greatest social need to make technical corrections and to update the statutory citation.

*Host agency:* The Department revises the definition of host agency three ways. First, we insert the word ''training'' before ''work site'' to underscore that the community service employment assignment is a venue for training SCSEP participants. We also create a stand-alone sentence stating that political parties cannot be host agencies, for clarity. Concerning political parties, we note that we interpret section 502(b)(1)(D) of the 2006 OAA as containing a misplaced ending parenthesis. As political parties are not covered by section 501(c)(3) of the Internal Revenue Code, we consider that the final parenthesis should appear after the word ''parties.'' Our interpretation here simply maintains the same understanding of host agencies as existed under the 2000 OAA—political parties cannot be host agencies, and non-profit agencies that are 501(c)(3) may be host agencies. Finally, we include the word ''sectarian'' before ''religious'' to more closely adhere to the language of the OAA.

*Indian:* We update the citation.

*Indian tribe:* We insert a citation to the Alaska Native Claims Settlement Act in the definition of Indian tribe, as is done in the statutory definition. We also update the citation.

*Individual Employment Plan or IEP:* We modify the definition of Individual Employment Plan by moving to the beginning of the definition the statement that the IEP is based on an assessment of the participant, because that fact is fundamental to the development of an IEP. We have added language to acknowledge that a recent assessment or IEP prepared by another employment and training program may be used in lieu of one prepared by the grantee or sub-recipient, reflecting language in the statute and in § 641.230, related to an assessment or IEP completed by the One-Stop delivery system. We delete the language concerning the ''appropriate sequence of services'' and add language referring to ''a related service strategy,'' reflecting language that has been added to the 2006 OAA. We add the word ''appropriate'' before ''employment goal'' to indicate that the employment goal should be one that reflects the assessment of the skills, talents, and training needs of the individual, and may need to be modified over time. We replace the phrase, ''achievement of objectives,'' with the phrase, ''objectives that lead to the goal,'' for increased clarity. We have added ''a timeline for the achievement of the objectives'' because we believe it is useful for the IEP to include target timeframes for the achievement of the identified objectives. We also make grammatical changes.

*Jobs for Veterans Act:* We revise the definition of the Jobs for Veterans Act to clarify that the Jobs for Veterans Act is a distinct statute from the priority of service provision in the OAA, although we use the definition of veteran contained in the Jobs for Veterans Act to determine which participants qualify for the veterans' priority for service (§ 641.520). We also modify the description of which participants qualify for the veterans' preference to more closely follow the language of the Jobs for Veterans Act.

*OAA:* We revise the definition of the Older Americans Act (OAA) to account for all amendments.

*Other participant (enrollee) costs:* We revise the definition of other participant (enrollee) costs to make certain technical corrections, we replace the phrase ''supportive services to assist'' with ''supportive services to enable,'' to track the language of the statute, and we clarify that training costs may be incurred prior to commencing or concurrent with a community service employment assignment.

*Participant:* We revise the definition of participant to clarify that an individual must be given a community service employment assignment to be considered a SCSEP participant, though the person need not have begun that assignment to be considered a SCSEP participant. This change makes it possible for participants to get paid their hourly wage for time spent on activities such as orientation and training before they begin working at their community service employment assignment.

*Poor employment prospects:* The phrase ''poor employment prospects'' appeared in the 2000 OAA and the Department defines it in the 2004 SCSEP final rule. The Department used the definition of poor employment prospects in the current regulations as the basis for developing this revised definition which provides that a person with poor employment prospects is one who has a significant barrier to employment. The barriers listed in the definition are mainly the same characteristics that appear in this definition in the current regulations, but with minor changes to reduce redundancy. The Department interprets the 2006 OAA's term ''poor employment prospects'' to have the same meaning as the similar phrase which also appears in the 2006 OAA, ''low employment prospects.'' Thus, the same definition is used for the term low employment prospects, which is also part of this section, but was published in the Senior Community Service Employment Program; Performance Accountability IFR at 72 FR 35832, Jun. 29, 2007.

*Program Year:* We alter the definition of Program Year to remove the statutory reference which no longer exists and to add the word ''on'' before ''July 1.'' The substance of the definition is not affected by these changes.

*Project:* We revise the definition of project for increased readability, to remove the unnecessary phrase, ''in a particular location within a State,'' and to make technical corrections. We also change the phrase, ''community service'' to ''service to communities'' in light of the Sense of Congress provision at section 516 of the 2006 OAA which indicates that one benefit of SCSEP projects is their impact on communities.

*Recipient:* We make technical corrections to the definition of recipient.

*Service area:* We revise the definition of service area by adding the clarifying phrase, ''in accordance with a grant agreement,'' for increased accuracy.

*State grantee:* We revise the definition of State grantee by adding the phrase, ''or the highest government official,'' after the word ''Governor,'' to account for those governmental jurisdictions that receive State SCSEP grants but do not have a Governor.

*State Plan:* We revise the definition of State Plan to specify that the State Plan now includes a four-year strategy for, and describes the planning and implementation process for, the statewide provision of SCSEP services, in accordance with section 503(a)(1) of the 2006 OAA.

*Sub-recipient:* Although in the current regulations the Department treats the terms sub-grantee and sub-recipient as synonymous, we now clarify that sub-recipient is the preferred term to use when referring to entities that receive SCSEP funds from grantees. Not all entities that receive SCSEP funds from grantees do so pursuant to a grant; in some cases the mechanism is a contract. Because the term sub-recipient is inclusive of both sub-grantees and sub-contractors, we do not provide separate definitions for these terms. The definition of sub-recipient that we employ is largely the same as the definition of sub-grantee that appears in the current regulations; we deleted one phrase referring to subcontracts because the definition now includes all varieties of sub-awards.

*Title V of the OAA:* We revise the definition of title V of the OAA to account for all amendments.

*Tribal organization:* We update the citation.

*Workforce Investment Act (WIA):* We clarify in the definition of the Workforce Investment Act that references to this law include any and all amendments, and we make technical corrections to the citations.

Deleted Definitions

The Department proposes to omit several definitions that appear in the current regulations. First, we remove definitions of ''placement into public or private unsubsidized employment'' and ''retention in public or private unsubsidized employment'' because those performance measures no longer exist. They were replaced in the IFR by the common measures entry and six-months retention indicators. We also eliminate the definition of co-enrollment because it related to private sector 502(e) projects which are no longer authorized. We eliminate the definition of State workforce agency because that phrase no longer appears in this rule. Finally, we remove the definition of sub-grantee and replace it with the more technically accurate term: ''sub-recipient.''

Unchanged Definitions

Definitions that remain unchanged are not reprinted.

The Department added and amended some SCSEP definitions related to performance accountability in the SCSEP; Performance Accountability; IFR, 72 FR 35832, Jun. 29, 2007. Those new and amended definitions do not appear in this proposed rule, and comments on those amendments were sought in the IFR.

*Subpart B—Coordination With the Workforce Investment Act*

This subpart covers those provisions of the OAA that require coordination with WIA. Please note that WIA contains additional provisions that are relevant to the SCSEP. The 2006 OAA requires changes to § 641.240 of this part. In addition, the Department proposes several clarifying changes to the regulatory text.

What Is the Relationship Between the SCSEP and the Workforce Investment Act? (§ 641.200)

The only proposed changes we make in this section are to clarify that sub-recipients (and not just grantees) are included in the requirement to follow all WIA rules and regulations, and to make certain technical corrections to the citations.

What Services, in Addition to the Applicable Core Services, Must SCSEP Grantees/Sub-Recipients Provide Through the One-Stop Delivery System? (§ 641.210)

This section requires SCSEP grantees and sub-recipients to make arrangements to provide their participants, eligible individuals the grantees/sub-recipients are unable to serve, as well as SCSEP ineligible individuals, with access to other services available at the One-Stop Career Center. There is no change to this section other than two proposed clarifications. First, the Department clarifies that core services are those defined in the WIA regulations at § 662.240 of this title. Second, we also clarify that, in addition to providing eligible and ineligible individuals with access to other activities and programs carried out by other One-Stop partners as is provided in the current regulations, SCSEP grantees/sub-recipients must also make arrangements through the One-Stop Delivery System to provide eligible and ineligible individuals with referrals to WIA intensive and training services. As a required One-Stop partner, and in light of the statutory language in both WIA and title V of the 2006 OAA on the cross-use of individual assessments, it is desirable that SCSEP grantees and sub-recipients make appropriate referrals to the One-Stop system for intensive and training services.

Does Title I of WIA Require the SCSEP To Use OAA Funds for Individuals Who Are Not Eligible for SCSEP Services or for Services That Are Not Authorized Under the OAA? (§ 641.220)

This section states that even in the One-Stop Career Center environment, SCSEP projects are limited to serving SCSEP-eligible individuals.

As discussed in the preamble section addressing SCSEP definitions (§ 641.140), the Department is proposing to revise the definition of participant to clarify that an individual must be given a community service employment assignment, though the person need not have begun that assignment, to be considered a SCSEP participant. Because of this proposed modification, we change the language, ''are functioning in a community service assignment,'' which had qualified the word participants, to ''have each received a community service employment assignment.'' We also propose to add language clarifying what an MOU is, and propose to cross-reference the WIA regulatory provisions that relate to the MOU.

Must the Individual Assessment Conducted by the SCSEP Grantee/Sub-Recipient and the Assessment Performed by the One-Stop Delivery System Be Accepted for Use by Either Entity To Determine the Individual's Need for Services in the SCSEP and Adult Programs Under Title I–B of WIA? (§ 641.230)

The only proposed changes the Department makes to this section are technical ones. We add the word ''sub-recipient'' to the heading for clarity. We also change the citation to the OAA to reflect the 2006 Amendments, and move the citation to after the first sentence, as the first sentence contains the provision located in the cited statutory section.

Are SCSEP Participants Eligible for Intensive and Training Services Under Title I of WIA? (§ 641.240)

This section addresses the eligibility of SCSEP participants for intensive and training services under title I of WIA. Under the OAA, SCSEP participants are not automatically eligible to receive intensive and training services under WIA, however Local Boards have the authority to deem SCSEP participants eligible to receive intensive and training services under title I of WIA. We note that WIA eligibility is not based on income except in the adult program when a local area determines that its funds are insufficient and provides priority to low-income individuals. Rather, WIA eligibility is based on the need for and utility of intensive and training services to obtain employment.

The Department proposes to revise paragraph (a) by removing the opening word ''yes'' since it could be read to imply that SCSEP participants are automatically eligible for intensive and training services under title I of WIA, even though the subsequent text states the contrary.

In paragraph (b) the Department proposes to make several changes. First, the current regulations state that, ''SCSEP participants who have been assessed through a SCSEP IEP have received an intensive service.'' An assessment is used in developing an IEP, but assessments are not accomplished through an IEP. Accordingly, to clarify the distinct roles of the assessment and the IEP, the phrase is proposed to read, ''SCSEP participants who have been assessed and for whom an IEP has been developed have received an intensive service.''

Also in paragraph (b), we propose to revise the sentence addressing SCSEP

participants and training. Whereas the current regulations state, ''SCSEP participants who seek unsubsidized employment as part of their SCSEP IEP, may require training to meet their objectives,'' the proposed rule instead says, ''[i]n order to enhance skill development related to the IEP, it may be necessary to provide training beyond the community service employment assignment to enable the participant to meet their unsubsidized employment objectives.'' We propose this change to reinforce the role of the IEP, because unsubsidized employment is a goal for all of the SCSEP, not just certain participants, and to clarify that the training under discussion here is training other than that accomplished via the community service employment assignment. We also propose to add a reference to § 641.540, the section of these regulations that addresses participant training in depth.

The Department proposes to delete what is paragraph (c) in the current regulations; the Department determined this paragraph conflicts with other relevant regulatory provisions. Paragraph (c) states that community service employment assignments are analogous to work experience activities or intensive services under WIA. This paragraph could create confusion with paragraph (a) of this section, which correctly states that SCSEP participants are not automatically eligible for WIA intensive and training services. Whether or not a community service employment assignment is considered to be an intensive service, a SCSEP participant must still meet the other WIA eligibility requirements to be eligible for training services.

The Department also proposes to delete what is paragraph (d) in the current regulations because the subject of that paragraph is thoroughly covered in subpart E. Paragraph (d) indicates that SCSEP participants may be paid while receiving intensive or training services. An explanation of participant wages appears in § 641.565 of these regulations.

*Subpart C—The State Plan*

The Department proposes to change the title of this subpart to reflect a change in the name of the State Plan in the 2006 OAA from the prior term, the ''State Senior Employment Services Coordination Plan.'' This subpart of the regulations implements the new provisions in section 503 of the 2006 OAA, which direct the Governor, or the highest government official, of each State to submit a State Plan that contains a four-year strategy, and require that the State Plan be updated at least every two years. As reflected in these proposed regulations, the State Plan now has a broader role than merely coordination.

Comments are welcome on requirements for the four-year strategy, as well as other changes affecting the State Plan that are identified in this preamble or other changes to the current regulations which flow from the 2006 Amendments.

What Is the State Plan? (§ 641.300)

This section describes the State Plan and emphasizes that it is intended to foster collaboration among SCSEP stakeholders. As noted above, the Department proposes to change the name of the State Plan to reflect the 2006 OAA. We also propose to add language reflecting the new requirement that the State Plan outline a four-year strategy for the statewide provision of community service and other authorized activities for eligible individuals under the SCSEP. The four-year strategy is one component of the State Plan; § 641.325 of these proposed regulations specifies additional information required in the State Plan.

What Is a Four-Year Strategy? (§ 641.302)

The 2006 OAA requires that States include a four-year strategy in the State Plan; in this proposed section, the Department explains what States must include in their four-year strategy. The four-year strategy is only one component of the State Plan; other elements are discussed in § 641.325 of these regulations. The 2006 OAA does not elaborate on the contents of the four-year strategy, but grants the Secretary authority to determine what provisions should be in the State Plan, consistent with title V. These proposed regulations specify what States must include in the four-year strategy.

The Department views the four-year strategy as an opportunity for the State to take a longer-term view of the SCSEP in the State, including its role in workforce development, given projected changes in the State's demographics (particularly the number of older workers), economy, and labor market. In preparing the four-year strategy, the State should address the role of SCSEP vis-á-vis other workforce programs and initiatives as well as other programs serving older workers, and how the State and SCSEP grantees can utilize these other programs to maximize the services available to the SCSEP-eligible population. The four-year strategy also should be used by the State to examine and, as appropriate, plan longer-term changes to the design of the program within the State, such as changes in the utilization of SCSEP grantees and program operators to better achieve the goals of the program.

To achieve the objectives described above, the Department proposes to require that the four-year strategy include the following specific elements. First, it must explain the State's long-term plan for achieving an equitable distribution of SCSEP positions within the State (the equitable distribution report, discussed in §§ 641.360 and 641.365, addresses this for the short-term). This information is required as part of the State Plan (see § 641.325), but the State should address equitable distribution over a longer period in its four-year strategy. The strategy must specifically address how, over the four-year period, the State intends to: (1) Move positions from over-served to underserved locations within the State, pursuant to § 641.365 of these regulations; (2) equitably serve rural and urban areas; and (3) serve individuals afforded priority for community service employment and other authorized activities, pursuant to § 641.520 of these regulations. Second, a related provision requires that the State explain its long-term strategy for avoiding disruptions to the program when new Census data that affects the distribution of SCSEP positions across the State becomes available, or when there is over-enrollment for any other reason. This information is included in the State Plan for the short-term, but the State should plan over a longer term for avoidance of disruptions when new Census data become available or there is over-enrollment.

Third, the four-year strategy must provide the State's long-term plan for serving minority older individuals under the SCSEP. Section 515 of the 2006 OAA requires a report on services to minority individuals, and this element in the four-year strategy reinforces the law's focus on minority individuals and will provide information that may be used in the report. Fourth, the strategy must provide long-term projections for job growth in industries and occupations in the State that may provide employment opportunities for older workers, and how those relate to the types of unsubsidized jobs for which participants will be trained, and the types of skill training to be provided. The 2006 OAA added to the State Plan provisions the current and projected employment opportunities in the State, and it makes sense to look at this, in relation to the types of skill training provided to participants, not only in the

short-term, but over the longer-term encompassed by the four-year strategy.

Fifth, the four-year strategy must explain how the State plans to work with employers in the State to develop and promote opportunities for placement of SCSEP participants in unsubsidized employment. Working with employers to develop opportunities for placement of SCSEP participants in unsubsidized employment is an essential element of the program and necessary to achieve participation limits, so States should address this in their four-year strategy.

Sixth, the four-year strategy must provide the long-term strategy for increasing the level of performance for entry into unsubsidized employment by SCSEP participants. Specifically, the strategy must demonstrate how the State will achieve the minimum levels of performance required by section 513(a)(2)(E)(ii) of the OAA and § 641.720(a)(6) of the SCSEP regulations (published in the IFR), which set forth the minimum percentage for the expected level of performance for entry into unsubsidized employment for each of fiscal years 2007–2011. The expected level of performance on this core indicator increases over this time period, from 21 percent in fiscal year 2007, to 25 percent in fiscal year 2011. The Department recognizes that these are minimum levels and that some grantees already perform well above these minimum levels. All grantees should strive to continuously improve their performance levels to assist enrollees in becoming self-sufficient, make available opportunities for other individuals to enroll in SCSEP, and better fulfill the objectives of the program.

Seventh, the four-year strategy must indicate how the SCSEP activities of grantees will be coordinated with a number of other programs, initiatives, and entities. The State Plan must address coordination with WIA, but States should plan over a longer term to improve coordination with a variety of other programs, initiatives, and entities. These include: (1) Planned actions to coordinate with activities being carried out in the State under title I of WIA, including plans for utilizing the WIA One-Stop Delivery System and its partners to serve individuals aged 55 and older; (2) planned actions to coordinate with activities being carried out in the State under other titles of the OAA; (3) planned actions to coordinate with other public and private entities and programs that provide services to older Americans in the State (such as community and faith-based organizations, transportation programs, and programs for those with special needs or disabilities); and (4) planned actions to coordinate with other labor market and job training initiatives. These initiatives currently include the President's High Growth Job Training Initiative, Community-Based Job Training Grants, and the Workforce Innovation in Regional Economic Development (WIRED) Initiative.

Eighth, the State should explain its long-term strategy to improve SCSEP services, and may include recommendations to the Department, as appropriate. This is derived from current State Plan Instructions (Older Worker Bulletin 01–04), which specify that the State Plan may include recommendations to the Secretary of Labor on actions to be taken by SCSEP grantees in the State to improve SCSEP services. The recommendations may include such topics as the location of positions, the types of community services, the time required to make changes in the distribution of positions, and the types of participants to be enrolled.

Who Is Responsible for Developing and Submitting the State Plan? (§ 641.305)

The only change we propose to this section is to add the phrase, ''or the highest government official,'' after the word ''Governor'', to be inclusive of all jurisdictions that submit State Plans.

May the Governor, or the Highest Government Official, Delegate Responsibility for Developing and Submitting the State Plan? (§ 641.310)

The only proposed change to this provision is to add in the heading the phrase, ''or the highest government official,'' after the word, ''Governor,'' to be inclusive of jurisdictions where the head of the government is not a Governor.

Who Participates in Developing the State Plan? (§ 641.315)

This provision lists the individuals and organizations from whom the Governor, or the highest government official, is required to seek advice and recommendations related to the State Plan, in accordance with section 503(a)(2) of the OAA. The 2006 OAA changes the task of the Governor (or highest government official) from ''obtaining'' the advice and recommendations of these entities to ''seeking'' advice and recommendations. The Department therefore proposes to revise this section to use the word ''seek.'' We interpret this to mean that the Governor (or highest government official) must make a good faith effort to obtain advice and recommendations from the listed individuals and organizations, whether or not each of these chooses to submit its views. We also propose to replace the phrase ''underserved older individuals'' with ''unemployed older individuals,'' in accordance with the same change in the 2006 OAA.

Must All National Grantees Operating Within a State Participate in the State Planning Process? (§ 641.320)

Section 503(a)(2) of the OAA requires the Governor, or the highest government official, to seek the advice and recommendations of a number of different parties concerning SCSEP services in the State. Although that particular section of the OAA does not require national grantees to participate in the State Plan process, section 514(c)(6) of the OAA establishes that when selecting national grantees, the Department must consider an applicant's ability to coordinate their activities with other organizations at the State and local levels. The State Plan is the process by which SCSEP services are coordinated at the State level; accordingly, section 514(c)(6) effectively requires national grantees to participate in the State planning process. To clarify the source of this requirement, the Department proposes to omit the language referring to OAA section 503(a)(2) from paragraph (a) of this section. We have also updated the remaining citation in paragraph (a) to account for where this provision is located in the 2006 OAA.

Paragraph (b) concerns exemptions from the requirement in paragraph (a); we propose several changes to this paragraph. The 2004 SCSEP final rule exempts national grantees serving older American Indians from the State planning process, based on section 503(a)(8) of the 2000 OAA, although the Department encourages their participation. The proposed regulation adds grantees serving older Pacific Island and Asian Americans to the grantee exemption from the requirement to participate in the State planning process, consistent with section 503(a)(8) of the 2006 OAA. However, the Department continues to encourage exempted grantees to participate in the State planning process in the areas in which they operate. Also in paragraph (b), we propose to change the phrase, ''are exempted from participating in the planning requirements'' to ''are exempted from the requirement to participate in the State planning processes,'' for clarity.

The Department proposes to clarify in paragraph (b) that the exemption from the requirement to participate in the

State planning process applies to grantees using funds specifically reserved for projects serving older American Indians and older Pacific Island and Asian Americans under OAA section 506(a)(3); this clarification is consistent with section 503(a)(8) of the 2006 OAA. We also propose to add new language concerning a grantee using both reserved and non-reserved funds. All grantees of non-reserved SCSEP funds, including grantees that have also received reserved funds, are required to participate in the State planning process per paragraph (a). Having applied for and accepted non-reserved funds, grantees become subject to the same coordination requirements as all other recipients of non-reserved funds. Accordingly, if a grantee that receives reserved funds under one grant is also awarded a non-reserved funds grant, the grantee is required to participate in the State planning process for purposes of the non-reserved funds grant.

Finally, we propose to delete from paragraph (b) the statement that if an exempt grantee chooses not to participate in the State planning process it is required to describe its plan for serving its constituency in its grant application. This is redundant because all grant applications require applicants to describe such plans, regardless of past participation in the State planning process. We also make certain grammatical improvements.

What Information Must Be Provided in the State Plan? (§ 641.325)

This section lists the minimum requirements of the State Plan, consistent with section 503(a)(4) of the OAA. In the opening sentences of the proposed section we add a requirement that the State Plan include the State's four-year strategy, as required by section 503(a)(1) of the 2006 OAA and as described in § 641.302.

Paragraph (a) remains unchanged. In paragraph (b), we propose to add a requirement that the State Plan provide information on the relative distribution of eligible individuals who are limited English proficient as required by 2006 OAA section 503 (a)(4)(C)(iii). In paragraph (c), we propose to replace the requirement to identify and address ''the employment situations and the types of skills possessed by eligible individuals,'' which appears in the current regulations, with a new requirement stemming from a revised section 503(a)(4)(D) of the 2006 OAA, that the plan provide information on the current and projected employment opportunities in the State (such as by providing employment statistics available under section 15 of the Wagner-Peyser Act (29 U.S.C. 491–2) by occupation) and the type of skills possessed by local eligible individuals. State labor market information is available through the following link to America's Career Information Network: *http://www.acinet.org/acinet/crl/library.aspx?PostVal=10&CATID=52*. We propose to make these changes in accordance with the same changes in the 2006 OAA.

Paragraph (d) currently requires a description of the localities and populations for which community service projects in the State are most needed. We propose to change this paragraph by removing the words, ''community service'' before the word ''projects'' to follow the same change in section 503(a)(4)(E) the 2006 OAA.

We propose a slight modification to paragraph (e). Instead of requiring that the State Plan include actions taken ''or'' planned concerning coordination with WIA, we require the Plan to include actions taken ''and/or'' planned to capture actions already taken in addition to those being planned.

What appears as paragraph (f) in the current regulations is moved to paragraph (g), and we propose a new paragraph (f), which would require that the State Plan describe the process used to seek advice and recommendations on the State Plan from representatives of organizations and individuals listed in § 641.315, and the process used to seek advice and recommendations on steps to coordinate SCSEP services with activities funded under title I of WIA from representatives of organizations listed in § 641.335. Since the 2006 OAA requires that advice and recommendations be sought from representatives of these organizations and individuals, the Department believes it is reasonable for the State Plan to describe how this input was obtained.

Proposed paragraph (g) mirrors what is paragraph (f) in the current regulations, and requires the State Plan to describe the planning process, including opportunities for public comment. The only change to this paragraph is that we propose to add a reference to § 641.350, which requires the State to solicit public comments.

There is no change to the text of what appears as paragraph (g) in the current regulations, although it appears as paragraph (h) here. The paragraph that is labeled (h) in the current regulations is labeled paragraph (i) here; the only change is that the reference to § 641.365 has been taken out of parentheses. Finally, the text that appears as paragraph (i) in the current regulations is repeated verbatim here although it is now labeled paragraph (j).

How Should the State Plan Reflect Community Service Needs? (§ 641.330)

There is no change to this provision.

How Should the Governor, or the Highest Government Official, Address the Coordination of SCSEP Services With Activities Funded Under Title I of WIA? (§ 641.335)

The only proposed change to this provision is to add in the heading the phrase, ''or the highest government official,'' after the word, ''Governor,'' to be inclusive of jurisdictions where the head of the government is not a Governor.

How Often Must the Governor, or the Highest Government Official, Update the State Plan? (§ 641.340)

The Department proposes to reword the heading question for this section because the former heading assumed an annual review of the State Plan, which is no longer required under the 2006 OAA, and to include the phrase, ''or the highest government official,'' to be inclusive of jurisdictions for which the head of the government is not a Governor. Instead, the 2006 OAA requires that the State Plan be reviewed, updated, and submitted to the Secretary not less often than every two years. The Department revises the proposed section to reflect the new requirement. We encourage States to review their State Plan more frequently than every two years, and make necessary adjustments and submit modifications as circumstances warrant. The Department intends for the State Plan to be a living document that will guide the strategic and ongoing operations of the SCSEP within the State. Prior to submitting an update of the State Plan to the Department the Governor, or highest government official, must seek the advice and recommendations of the individuals and organizations identified in § 641.315 about what, if any, changes are needed, and publish the State Plan, showing the changes, for public comment.

We also propose to add cites to corresponding statutory provisions.

What Are the Requirements for Modifying the State Plan? (§ 641.345)

The Department proposes a new paragraph (a) to distinguish State Plan updates from State Plan modifications; the remaining paragraphs have been re-designated. Whereas States are required to update their State Plan not less often than every two years, modifications may be submitted anytime circumstances

warrant. Both updates and modifications require an opportunity for the public to comment on the State Plan, but only in the event of a State Plan update (§ 641.340) are States required to seek the advice and comment of the individuals and organizations identified in § 641.315.

Paragraph (b), which is labeled paragraph (a) in the current regulations, addresses what circumstances require a modification to the State Plan. The only changes we propose in paragraph (b) are changing the word ''strategies'' to ''four-year strategy,'' and adding the word ''significant'' before the word ''changes.'' We propose the latter change to clarify that trivial changes do not warrant a modification to the State Plan.

In paragraph (c) we state that modifications to the State Plan must be open for public comment. We propose to delete a reference to § 641.325 from this paragraph because that section merely lists the required contents of the State Plan. We propose to leave intact the reference to § 641.350 which addresses soliciting public comment on the State Plan. In paragraph (d) we clarify that States need not seek the advice and recommendations of the individuals and organizations identified in § 641.315 when modifying the State Plan.

Paragraph (e), which appears as paragraph (c) in the current regulations, remains unchanged.

How Should Public Comments Be Solicited and Collected? (§ 641.350)

There is no change to this provision.

Who May Comment on the State Plan? (§ 641.355)

There is no change to this provision.

How Does the State Plan Relate to the Equitable Distribution Report? (§ 641.360)

The equitable distribution report shows where SCSEP positions are located throughout a State on a grantee-by-grantee basis and is required by section 508 of the OAA. State grantees are responsible for preparing the report at the beginning of each fiscal year. SCSEP grantees use the equitable distribution report to improve on the distribution of SCSEP positions within the State. The information contained in the equitable distribution report is used in preparing the State Plan; however, the State Plan requires additional information. This section is substantively the same as in the current regulations, but the Department proposes to change the reference to the State Plan to reflect the statutory requirement, new to the 2006 OAA, that the Plan be updated and sent to the Secretary not less often than every two years, whereas in the current regulations we reference annual State Plans. The Department also proposes to remove redundant language concerning the role of the equitable distribution report.

How Must the Equitable Distribution Provisions Be Reconciled With the Provision That Disruptions to Current Participants Should Be Avoided? (§ 641.365)

This section is largely the same as in the current regulations, but since the 2006 OAA places time limits on participation in the SCSEP, the Department proposes to revise this section to provide a cross-reference to § 641.570 of these regulations, where the new time limit is addressed. We propose to remove the reference to § 641.575 because limits set on the amount of time a participant spends in a particular community service employment assignment do not affect the distribution of SCSEP positions. We also propose to rephrase the first sentence, concerning avoiding disruptions in services, for greater clarity. Finally, we make several grammatical and technical corrections.

*Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants*

This subpart covers the grant application, eligibility, and award requirements for all SCSEP grants under section 506 of the 2006 OAA, which describes distribution of assistance to State and national grantees. The Department proposes to change the title of this subpart to clarify that this subpart applies to National and State grants, but not the pilot, demonstration, and evaluation grants described in subpart F.

The proposed changes in this subpart support an increased emphasis on the grantees' accountability for results in order to achieve enhanced program performance. This subpart describes organizations eligible to apply for SCSEP grants, application requirements, eligibility criteria, responsibility reviews, and how the Department will select grantees. Comments are welcome on the new and revised grant application, eligibility, and award requirements that are discussed in this preamble or other changes to this subpart which flow from the 2006 OAA.

What Entities Are Eligible To Apply to the Department for Funds To Administer SCSEP Projects? (§ 641.400)

The Department proposes to delete ''community service'' from the heading question of this section to be consistent with the rest of these regulations which generally refer simply to ''SCSEP projects.''

Section 502(b)(1) of the 2006 OAA authorizes the Secretary to make grants to public and nonprofit private agencies and organizations, agencies of a State, and tribal organizations, to administer SCSEP projects. This section is the corresponding regulatory provision.

The Department proposes no changes to paragraph (a). In the current regulations, paragraph (b) specifies the eligible entities that can apply for national grant funds in a State if the national grantee consistently fails to meet State performance measures. The Department proposes to delete paragraph (b) because under the 2006 OAA, national grantees are held accountable only for their national goals.

The Department proposes a few changes to former paragraph (c), which is now labeled paragraph (b), concerning State grants. First, we divide the paragraph into two parts. Proposed paragraph (b)(1) addresses the general statutory requirement that the Department award a SCSEP grant to each State. We propose to change the phrase, ''enter into agreements with each State,'' to, ''award each State a grant,'' for clarity. Also, whereas the current regulations provide that States can use individual State agencies, political subdivisions of a State, a combination of political subdivisions, or a national grantee operating in the State to administer SCSEP funds, the proposed paragraph provides that a State may designate only an individual State agency. We propose to delete the options concerning political subdivisions of a State to follow the same change in section 502(b)(1) of the 2006 OAA. We propose to delete the option of a national grantee operating in a State partly because, to date, all State grantees have been State agencies, and partly because in the event of the competition contemplated by paragraph (b)(2), all nonprofit private agencies and organizations are eligible to compete.

Proposed paragraph (b)(2) provides that a State must compete for its SCSEP State grant funds in the event that the designated State grantee fails to meet the expected levels of performance for the core performance measures for three consecutive years. We propose to change what appears as the third sentence of paragraph (b) in the current regulations to the active voice for readability. We also propose to alter the statutory reference so that we now refer to the section of the statute that establishes State grant funding rather

than the statutory section that requires that a State's funds being competed after repeated failure to meet performance measures.

Finally, the Department proposes to add that the designated entity that failed to meet core performance measures for three consecutive years is not eligible to compete for SCSEP funds for the first full Program Year following the determination of the third year of consecutive failure. We add this sentence to ensure that the State competition acts as a consequence for repeated failure to perform. A similar provision governs national grantees; a national grantee that fails to meet the expected levels of performance for four consecutive years is ineligible to compete in the grant competition following the fourth year of consecutive failure (OAA sec. 513(d)(2)(B)(iii)).

How Does an Eligible Entity Apply? (§ 641.410)

This section directs interested applicants, including States, to follow instructions issued by the Department to apply for a SCSEP grant. National grants are competed, and the Department generally publishes application guidelines in Solicitations for Grant Applications (SGA) in the **Federal Register**. The Department usually issues instructions for State grants, which are not competed, in administrative guidance.

In paragraph (a), the Department proposes to add ''evaluation criteria'' to the list of what is included in the application guidelines because these criteria will be set forth in the SGA for national funds and may change over time. We also propose to change the phrase, ''State and national SCSEP funds,'' to ''national funds, and State funds,'' because, under the 2006 OAA, those types of funds are awarded differently (competitively versus noncompetitively) and on a different timetable (annually for State versus multi-year for national). We also propose to delete what is the last sentence of paragraph (a) in the current regulations, because it redundantly provides that applications are to be submitted in accordance with Departmental instructions.

Paragraph (b) implements OAA section 503(a)(5), which requires national grant applicants to provide their applications to the Governor, or the highest government official, of the State in which projects are proposed so that the Governor (or the highest government official) may make recommendations relating to position distribution. Grantees have generally provided Governors (or the highest government official) with executive summaries of their application; the Department will continue to consider such practice as fulfilling this requirement.

The current regulations exempt Indian organizations from this requirement because they are exempt from State planning. The Department proposes to continue this exemption policy, again because it is consistent with the exemption from State planning under OAA section 503(a)(8). We propose to add organizations serving Pacific Island and Asian Americans to the exemption because the 2006 OAA also exempted those organizations from State planning. We propose to clarify that this exemption from submitting national grant applications to the Governor, or the highest government official, applies to Indian and Pacific Island and Asian American organizations seeking funding reserved under OAA section 506(a)(3). While it remains the policy of the Department that these organizations are not required to submit their applications to the Governor (or the highest government official), we nevertheless encourage such entities to submit their applications to the Governor(s) in the State(s) they propose to serve so that the Governor(s) may better plan the activities in their State(s). We also note that if a grantee that is awarded a grant with reserved funds chooses to compete for other, non-reserved SCSEP funds, such a grantee would be required to submit its non-reserved fund grant application to the Governor (or the highest government official).

We also propose to add a phrase connecting the submission required in this paragraph to the Governor's (or the highest government official's) review, which is described in § 641.480 of these regulations.

In paragraph (c), the Department proposes to delete the phrase, ''community service project'' from between the words ''SCSEP'' and ''grant application'' to be consistent with the rest of these regulations which merely refer to ''SCSEP grants'' or ''SCSEP grant applications.'' We also propose to expand the cross-reference to State Plan requirements so that readers are directed to the entirety of subpart C.

What Are the Eligibility Criteria That Each Applicant Must Meet? (§ 641.420)

The Department proposes to move the former § 641.420, which addresses what factors we consider in selecting grantees, to § 641.460, so that it follows all the provisions relating to grant application requirements, and we renumber the remaining sections accordingly.

This renumbered section, which is § 641.430 in the current regulations, describes the eligibility criteria for SCSEP grant applicants. The Department proposes to update language in paragraph (a), specifying that applicants must demonstrate an ability to administer a program that serves the greatest number of eligible participants and most-in-need individuals, to reflect the language of section 514(c)(1) of the 2006 OAA. Paragraphs (b) and (c) remain the same.

The Department proposes to add a new paragraph (d) relating to the applicant's past performance to conform with section 514(c)(4) of the 2006 OAA, and to re-designate the remaining paragraphs accordingly. For applicants that have previously received a SCSEP grant, this criterion addresses the applicant's prior performance in meeting SCSEP core and additional measures of performance. For applicants who have not received a SCSEP grant in the past, this addresses the applicant's prior performance under other Federal or State programs. The Department proposes to add a phrase in paragraph (e) (which is paragraph (d) in the current regulations) specifying that grantees must be able to move most-in-need individuals into unsubsidized employment, to reflect the eligibility criterion specified in section 514(c)(5) of the 2006 OAA.

In paragraph (f), the Department proposes to add the word ''activities'' to clarify the focus of coordination at the State and local levels, in accordance with the same change in section 514(c)(6) of the 2006 OAA. We propose one change in paragraph (g), which is paragraph (f) in the current regulations. We propose to replace the word, ''including'' with the phrase, ''as reflected in,'' for clarity. The Department also proposes to add a new paragraph (h), requiring that grantees be able to administer a project that provides community service to be considered eligible, in order to be consistent with section 514(c)(8) of the 2006 OAA. The Department proposes to add the phrase ''and in community services provided'' in paragraph (i) when describing a grantee's ability to minimize disruption, in accordance with section 514(c)(9) of the 2006 OAA. In paragraph (j) (formerly paragraph (h)), we propose to replace ''Secretary of Labor'' with ''Department'' to be consistent with the rest of these regulations.

What Are the Responsibility Conditions That an Applicant Must Meet? (§ 641.430)

This section contains the responsibility review provisions codified in section 514(d) of the 2006 OAA. The Department proposes to add an opening phrase, ''[s]ubject to § 641.440,'' because that section addresses responsibility conditions that, alone, will disqualify a grant applicant. Also in the opening sentence, we propose to replace the phrase ''any of the acts of misfeasance or malfeasance described in § 641.440(a)–(n) of this section'' with the simpler, ''any of the following acts,'' because paragraphs (a) through (n) comprise the entirety of this section and all are acts of either misfeasance or malfeasance.

In paragraph (a) the Department proposes to replace the word ''sub-grantee'' with ''sub-recipient'' for consistency throughout this proposed rule and with the description of sub-recipients in the Office of Management and Budget (OMB) Circular A–133. Accordingly, we delete the term ''sub-contractors'' from this paragraph because the term sub-recipients includes both sub-grantees and sub-contractors. In paragraph (e), the Department proposes to change the phrase, ''meet applicable performance measures,'' to ''meet applicable core performance measures or address other applicable indicators of performance'' to reflect the same change in section 514(d)(4)(E) of the 2006 OAA. In paragraph (k), we propose to delete the reference to 20 CFR 667.200(b) because SCSEP grantees/sub-recipients are not required to follow the audit requirements in that regulation. The audit requirements for the SCSEP are located in § 641.821, which is properly referenced in paragraph (k).

We also propose several grammatical and clarifying changes.

Are There Responsibility Conditions That Alone Will Disqualify an Applicant? (§ 641.440)

The Department proposes to combine into paragraph (a) what are paragraphs (a) and (b) in the current regulations for increased clarity. In what is now paragraph (b), the Department proposes to clarify that we will determine the existence of significant fraud or criminal activity. We also propose to revise the language concerning handling Federal funds to be grammatically correct. The Department proposes to revise the last sentence on fraud or criminal activity determination for readability and to again clarify that the Department makes that determination.

How Will the Department Examine the Responsibility of Eligible Entities? (§ 641.450)

The Department proposes to remove the words ''conduct a'' and ''of'' from the phrase ''conduct a review of available records,'' for readability.

What Factors Will the Department Consider in Selecting National Grantees? (§ 641.460)

The Department proposes to move the former § 641.420, which addresses what factors we consider in selecting grantees, to § 641.460, so that it follows all the provisions relating to grant application requirements, and we renumber the remaining sections accordingly. Also, we propose to add the word, ''national,'' to the heading of this section because the Department only executes competitions for national grants. Although a State grant must be competed if the designated State agency fails to achieve its core performance levels for three consecutive years, it is the State rather than the Department that carries out such a competition.

This section describes the criteria to be used for the selection of national SCSEP grantees. The Department proposes to drop the conditional language ''if there is a full and open competition'' because the 2006 OAA requires a regular competition for national grants. The Department also proposes to drop the reference to past performance among the rating criteria the Department will consider, and instead adds a new criterion relating to past performance in the section on eligibility criteria (§ 641.420). The Department makes this change in accordance with the 2006 Amendments to section 514(c)(4) of the OAA. We also propose to clarify in the second sentence that the sections to which we refer are sections of these regulations, to avoid any possible confusion with sections of the OAA.

Under What Circumstances May the Department Reject an Application? (§ 641.465)

The only change we propose to make to this section is removing the word ''program'' after ''the SCSEP'' because the ''P'' in the acronym SCSEP stands for program.

What Happens If an Applicant's Application Is Rejected? (§ 641.470)

The Department proposes to revise this section to accurately reflect the process currently used by the Department for applications that are not funded. Under the current process, non-selected entities that request an explanation are provided with feedback on the shortcomings of their proposal. We also propose to include a reference in paragraph (a) to § 641.900, which addresses the appeal process available to a rejected applicant. We propose to reword paragraph (b) to clarify that incumbent grantees are not to receive any technical assistance related to any new application/proposal which they are submitting or planning to submit for a possible new award. Any technical assistance that incumbent grantees receive must relate to activities and/or performance under the existing grant.

The Department proposes to revise what appears as paragraph (c) in the current regulations in several ways. First, we propose to divide it into three paragraphs, now lettered (c), (d), and (f), for clarity. We also revise the text of what is paragraph (c) so that proposed paragraphs (c) and (d) accurately reflect and clarify the possible remedies on appeal. We propose to include another reference to § 641.900 in proposed paragraph (c). In paragraphs (c) and (d) we propose to change the word ''slot'' to ''position'' to be consistent with the use of the term ''position'' in the rest of these regulations.

The Department proposes to add a new paragraph (e) to clarify that if a party is not satisfied with the Grant Officer's decision about whether the organization continues to meet the requirements of this part, whether positions will be awarded to the organization, and the timing of the award, the Grant Officer must return the decision to the Administrative Law Judge for review. We propose to re-designate the remaining paragraph, which appears as paragraph (d) in the current regulations, as paragraph (f).

We also propose grammatical and clarifying changes.

May the Governor, or the Highest Government Official, Make Recommendations to the Department on National Grant Applications? (§ 641.480)

This section explains the Governor's, or the highest government official's, statutory authority under section 503(a)(5) of the OAA to make recommendations to the Department on grant applications before funds are awarded. We propose to add the word ''national'' to the heading because this section is limited in application to national grants. We propose to add to paragraph (a) a reference to § 641.410(b); that is the regulatory provision that requires national grant applicants to submit their application to the Governor, or the highest government official, of each State in which projects are proposed. We also propose to add a

citation to the OAA. In paragraph (b), the Department proposes to drop the reference to the Governor making recommendations under noncompetitive conditions because national grants will now be competed on a regular basis.

When Will the Department Compete SCSEP Grant Awards? (§ 641.490)

This section outlines the circumstances under which there must be a competition for SCSEP funds. The Department proposes to divide paragraph (a) into two subparagraphs. In paragraph (a)(1), we propose to reflect the statutory requirement that the Department will generally hold a competition for national grants every four years. We also propose to state that we will publish a Solicitation for Grant Applications in the **Federal Register**. In paragraph (a)(2) we propose to add a sentence indicating that the statute gives the Department the authority to provide an additional one-year grant to national grantees. The Department makes these changes to paragraph (a) in accordance with section 514(a) of the 2006 OAA; we propose to add specific statutory cites to both subparagraphs of paragraph (a).

The Department proposes to revise paragraph (b) to specify that when a State grantee fails to meet its expected levels of performance for the core indicators for three consecutive Program Years, the State must hold a full and open competition for the SCSEP funds allotted to the State. We propose this change in accordance with section 513(d)(3)(B)(iii) of the 2006 OAA, and propose to add a cite to this paragraph.

When Must a State Compete Its SCSEP Award? (§ 641.495)

The Department proposes a new section to address the competition that is required if a State grantee fails to meet its expected core levels of performance for three consecutive Program Years. Performance measures were discussed in the IFR, 72 FR 35832, June 29, 2007.

*Subpart E—Services to Participants*

This subpart covers services to SCSEP participants. The Department here proposes to implement new provisions in the 2006 OAA relating to income eligibility, priorities in enrollment of participants, changes in benefit policies, and time limits for program participation. We also address the types of services that participants may receive, procedures concerning termination from the program, and the grantee's responsibilities relating to participants. Comments are welcome on the proposed changes to subpart E described in this preamble or on other changes to subpart E which flow from the 2006 Amendments.

Who Is Eligible To Participate in the SCSEP? (§ 641.500)

This provision establishes the statutorily defined eligibility criteria. The Department proposes to move what was paragraph (b) of this section, concerning cross-border agreements, to § 641.515 of these regulations, which addresses participant recruitment and selection, because cross-border agreements are more relevant to participant recruitment than they are to participant eligibility. We propose to revise the remaining paragraph, which is paragraph (a) in the current regulations, to add the requirement that age- and income-eligible individuals must also be unemployed, as required by section 502(a)(1) of the 2006 OAA. In the current regulations, the requirement that the applicant be unemployed is only referenced in the regulations at § 641.120, relating to program purpose; the Department subsequently issued administrative guidance clarifying that being unemployed was an eligibility criterion (TEGL No. 13–04). We interpret section 502(a)(1) of the 2006 OAA as treating unemployment as a SCSEP eligibility criterion. Such an interpretation is consistent with the training purpose of this program, and is also consistent with the policy expressed in § 641.512 of these regulations that job-ready individuals cannot be enrolled in the SCSEP but should be referred to an employment provider. Moreover, including unemployment as an eligibility criterion is consistent with the role of the SCSEP as serving seniors who are most in need of employment and training services. We also propose to add the word, ''Federal,'' to clarify that the poverty guidelines we refer to are Federal poverty guidelines.

When Is Eligibility Determined? (§ 641.505)

This section states that initial eligibility is determined at the time of an individual's application. After the initial eligibility determination, grantees/sub-recipients are responsible for verifying the eligibility of participants at least once every 12 months, and may do so more frequently as circumstances require.

The Department proposes to add the phrase, ''including instances when enrollment is delayed,'' to the last sentence of this section. Many grantees/sub-recipients maintain waiting lists and considerable time may pass from the time of initial eligibility determination to the time when a SCSEP position becomes available. Accordingly, we indicate through this additional phrase that delayed enrollment is one example of a circumstance when it may be appropriate to verify continued eligibility of an individual.

How Is Applicant Income Computed? (§ 641.507)

This proposed new section discusses computing income eligibility. We propose to move the section that is numbered § 641.507 in the current regulations, which addresses what types of participant income are included and excluded to § 641.510.

Section 518(a)(4) of the 2006 OAA delineates the procedure for calculating participant income. The Department implemented these procedures effective January 1, 2007, when it issued TEGL No. 12–06. We now propose to establish the same procedures in this section. Grantees may calculate income based on the income received during the 12 months prior to application, or may annualize the income received during the 6 months prior to application. (Program guidance prior to TEGL No. 12–06 limited the calculation time period to the 6 months prior to application, annualized.) The Department encourages grantees to choose the computation method that is most favorable to each participant, on a case-by-case basis, for the broadest possible inclusion of eligible applicants.

What Types of Income Are Included and Excluded for Participant Eligibility Determinations? (§ 641.510)

The Department proposes to delete the heading and content of what appears as § 641.510 in the current regulations, which addresses terminating a participant who becomes income ineligible, because terminations are fully addressed in § 641.580. The content of what is § 641.510 in the current regulations is covered in § 641.580(b) of this proposed rule.

The section addressing what types of income are included and excluded is numbered § 641.507 in the current regulations. We propose to move this heading to § 641.510 so that it may follow the section on computing income.

The Department proposes to revise the substance of this section to include the 2006 OAA's requirements relating to income eligibility determinations and to refer to the administrative guidance that provides a complete explanation of SCSEP participant income eligibility determination procedures.

Section 518(a)(3)(A) of the 2006 OAA excludes four sources of income from SCSEP income eligibility determinations. The Department issued administrative guidance in TEGL No. 12–06, which implemented these exclusions effective January 1, 2007. The Department implemented these exclusions prior to the effective date of the 2006 OAA (July 1, 2007) in order to alleviate the difficulties grantees and sub-recipients have encountered in recruiting sufficient numbers of eligible individuals under the prior income eligibility guidelines.

In general, the Department utilizes definitions from the U.S. Census Bureau's Current Population Survey (CPS) to define income for the purposes of SCSEP income eligibility. However, in addition to the statutory exclusions noted above, TEGL No. 12–06 carries forward additional exceptions to the CPS definitions of income for purposes of SCSEP income eligibility determinations from guidance in effect prior to the 2006 OAA. The additional exceptions are based on the recognition that these income sources (e.g., child support, public assistance, income from employment and training programs) rise out of some state of dependency or are intended to encourage individuals drawing benefits to return to work and should not disqualify otherwise needy individuals. TEGL No. 12–06 is available on the SCSEP Web site, *http://www.doleta.gov/seniors*, under the Grantee Information, Technical Assistance link.

May Grantees/Sub-Recipients Enroll Otherwise Eligible Individuals and Place Them Directly Into Unsubsidized Employment? (§ 641.512)

The 2006 OAA and the Department encourage grantees/sub-recipients to work with those participants who are the most difficult to place, rather than those ready for immediate job placement, to provide them with the services necessary to develop the skills needed for job placement. The Department proposes to move and substantially revise what is § 641.560 in the current regulations and replace it with proposed § 641.512. We propose to change the heading from § 641.560 to clarify that the subject of this section is not participants but potential participants. We propose to move this provision to 641.512 so that it appears with more closely-related topics such as eligibility, recruitment, and selection.

In the current regulations, § 641.560 encourages grantees not to enroll individuals who can be placed directly into unsubsidized employment. Proposed § 651.512 forbids grantees to enroll job-ready individuals, instead encouraging grantees to refer them to an employment provider such as the One-Stop Center for job placement assistance under WIA. In this way, the SCSEP can use its limited dollars to serve those who need the training the SCSEP provides, while individuals who do not need training can be served by an entity such as the One-Stop Career Center.

How Must Grantees/Sub-Recipients Recruit and Select Eligible Individuals for Participation in the SCSEP? (§ 641.515)

This section addresses recruitment and selection methods, including use of the One-Stop Delivery System, to ensure that the maximum number of eligible individuals have an opportunity to participate in the SCSEP.

In the current regulations, paragraph (a) includes a list of persons (such as minority individuals and limited English speakers) whom grantees should seek to enroll in the SCSEP. The list derived from OAA section 502(b)(1)(M), which was amended in the 2006 OAA. Accordingly, the Department proposes to revise the list in paragraph (a) to reflect the amended statutory language.

In paragraph (b), we propose to delete the sentence concerning listing community service opportunities with the State Workforce Agency because the corresponding statutory language was omitted from section 502(b)(1)(H) in the 2006 OAA.

Paragraph (c), concerning cross-border agreements, is new to this section. In the current regulations this paragraph appears in § 641.500, which addresses eligibility. The Department proposes to move this paragraph because cross-border agreements are more relevant to participant recruitment than they are to participant eligibility. We propose to specify that grantees entering into cross-border agreements must submit such agreements to the Department ''for approval'' to reflect current practice. Also in paragraph (c), the Department proposes to replace the word ''slot'' with ''position'' to be consistent with the rest of this part. Finally we propose to replace the word, ''between,'' with, ''among,'' to allow for cross-border agreements involving more than two states.

Are There Any Priorities That Grantees/Sub-Recipients Must Use in Selecting Eligible Individuals for Participation in the SCSEP? (§ 641.520)

In paragraph (a) of this section, the Department proposes to list the new statutory selection priorities identified in section 518(b) of the 2006 OAA. In paragraph (b), we interpret the priority for veterans as we did in the current regulations, such that the veterans' priority is afforded to individuals meeting the requirements of section 2(a) of the Jobs for Veterans Act (JVA), Public Law 107–288 (2002), which includes certain spouses of veterans.

In paragraph (c), we propose to specify an order for applying the priorities. The order has changed from what appears in the current regulations because the statutory priorities have changed. The proposed ordering of priorities incorporates the dual statutory priorities contained in the JVA and the OAA and is consistent with Departmental guidance on that topic (TEGL No. 5–03, available on the Department's Web site). Like other programs, veterans who also possess other of the OAA priority characteristics receive the highest preference. Because veteran status is a priority in both the OAA and the JVA, veterans without other of the OAA priority characteristics would be next in order of priority, followed by non-veterans with OAA priority characteristics.

Are There Any Other Groups of Individuals Who Should Be Given Special Consideration When Selecting SCSEP Participants? (§ 641.525 in the Current Regulations)

The Department proposes to delete the section that appears as 641.525 in the current regulations because the statutory provision upon which it is based, OAA section 502(b)(1)(M), is addressed in § 641.515(a).

Must the Grantee/Subgrantee Always Select Priority or Preference Individuals? (§ 641.530 in the Current Regulations)

The Department proposes to delete the section that appears as 641.530 in the current regulations, because according to section 518(b) of the 2006 OAA, a priority individual must always be chosen over a non-priority individual, when a choice must be made. We note that some grantees have ample program openings, so that all eligible individuals may be served. However, if there is only one opening and two eligible individuals apply, one of whom is a priority individual, the 2006 OAA requires that the priority individual be given the program position.

What Services Must Grantees/Sub-Recipients Provide to Participants? (§ 641.535)

This section sets forth those services that grantees/sub-recipients must provide to all SCSEP participants. Grantees are encouraged to utilize the

WIA system to assist in accomplishing the responsibilities outlined in this section.

Paragraph (a)(2) of this section describes the grantees'/sub-recipient's responsibility for assessing participants. The Department proposes to divide this paragraph into two subparts, the first addressing what should be assessed, and the second addressing the frequency of assessments. The sentence that now appears in proposed paragraph (a)(2)(i) is the first portion of paragraph (a)(2) in the current regulations. In proposed paragraph (a)(2)(ii) we revise the language that appears as the remaining portion of paragraph (a)(2) in the current regulations. We propose to state that the various assessment functions described in paragraph (a)(2)(i) of this section must be done initially upon program entry, and then subsequently as necessary, but at least two times a year. The initial assessment may count as one of the two that are required in the first year. This clarification is consistent with the expectation that unsubsidized employment is a goal for SCSEP, and all participants should be periodically assessed to check their progress toward transitioning to unsubsidized employment.

We propose several changes to paragraph (a)(3) of this section, which concerns IEPs. First, we propose to divide this paragraph into two subparagraphs to clearly delineate grantee/sub-recipient responsibilities related to the IEP. We propose to add the phrase, ''that includes an appropriate employment goal,'' after, ''develop an IEP,'' in paragraph (a)(3)(i) because unsubsidized employment is a goal for all of the SCSEP, and every IEP should be oriented toward that eventual goal. We propose to remove the reference to § 641.260 that appears in the current regulations; such a section does not exist in the current regulations nor is it in the proposed regulation. Instead, § 641.230 provides that an assessment or IEP completed by the SCSEP satisfies any condition for an assessment, service strategy, or IEP completed at the One-Stop, and vice-versa, so we add a reference to that section in paragraph (a)(3)(i). We propose to add the word, ''initial,'' before the word, ''assessment'' in paragraph (a)(3)(i) to distinguish this assessment from subsequent assessments. Additionally, the Department proposes to change the wording in both subparagraphs of paragraph (a)(3) to refer to an individual participant and an IEP rather than using the plural ''participants'' and ''IEPs;'' we propose these changes to clarify that an IEP must be developed for each participant individually. We also propose to add the words ''assessment and'' between ''WIA'' and ''IEP'' to clarify that assessments and IEPs are distinct; an assessment is used to develop an IEP. Finally, in proposed paragraph (a)(3)(ii), which addresses updating the IEP, we make one change from the language that appears as the last portion of paragraph (a)(3) in the current regulations. We propose to add the word, ''subsequent'' before ''participant assessments'' to distinguish these assessments from the initial assessment.

With regard to the assessments and IEPs discussed in paragraphs (a)(2) and (a)(3), we note that section 502(b)(1)(N) of the 2006 OAA requires that grantees/sub-recipients prepare an assessment of participants' skills, talents, and needs for services, and a ''related service strategy.'' The Department has determined that preparation of the IEP fulfills the requirement for a related service strategy.

In paragraph (a)(4) of this section we propose to change the word ''activity'' to ''assignment'' to be consistent with the term ''community service employment assignment'' used throughout this proposed rule.

Paragraph (a)(5) broadly addresses the training services that grantees/sub-recipients must provide to participants. (Section 641.540 addresses the specific types of training that may be provided.) In the current regulations there are two paragraphs concerning training: Paragraph (a)(5) addresses training specific to the community service employment assignment and paragraph (a)(6) addresses other training identified in participants' IEP. The Department proposes to merge those two paragraphs into a single paragraph because all training, whether or not initially provided specific to a community service assignment, must be consistent with a participant's IEP and should move the participant toward the goal of unsubsidized employment. Indeed, we consider the IEP to drive all services provided to participants, including training services. The remaining paragraphs have been renumbered accordingly.

We note that it is still permissible to provide training that enables a participant to successfully fulfill the duties of his or her community service employment assignment. However, such training is acceptable only so long as it is consistent with the IEP. Further, all training must contribute to the eventual goal of unsubsidized employment. Clearly, IEPs and training needs will vary greatly among participants. Nevertheless, the course charted in the IEP should be pointed in the direction of unsubsidized employment, and any training provided should advance the participant further along in that same direction.

Paragraph (a)(6), which appears as paragraph (a)(7) in the current regulations, remains unchanged. Proposed paragraphs (a)(7) and (a)(8) of this section appear in the current regulations, but are located at paragraphs (a)(12) and (a)(13). We propose to move them to paragraphs (a)(7) and (a)(8) to give a better sense of time order in the grantee's/sub-recipient's responsibilities. In paragraph (a)(7), the Department proposes to add the phrase ''or referring participants to appropriate services'' to more closely follow the statute and to indicate that, in addition to providing services directly or through WIA partner programs, SCSEP grantees/sub-recipients can use the One-Stop Centers to access the services of other service providers in the community.

In paragraph (a)(9) of this section, the Department proposes to change the term ''fringe benefits'' to ''benefits.'' We propose to delete the word ''fringe'' from the phrase ''fringe benefits'' throughout this proposed rule, to reinforce the notion that the SCSEP is a temporary training program as opposed to a more permanent employment situation, and to correspond to the same change in section 502(c)(6)(A) of the 2006 OAA. The Department also proposes to specify in paragraph (a)(9) that participants must receive a wage while in training, to conform to the 2006 OAA at sections 502(b)(1)(I), 502(b)(1)(J), and 502(c)(6)(A), as well as during orientation. Lastly, we propose to add to this paragraph a reference to the specific regulation sections that address wages and benefits.

The paragraphs that appear as (a)(9) and (a)(11) in the current regulations remain unchanged but appear here as paragraphs (a)(10) and (a)(11). The Department proposes to delete what is paragraph (a)(10) in the current regulations. That paragraph requires grantees to verify participant income at least once every 12 months and is repetitive of § 641.505. We also propose to delete what is paragraph (a)(14) in the current regulations, which discusses following up with participants to determine their need for supportive services after placement into unsubsidized employment, for two reasons. First, § 641.545 already permits grantees to provide or arrange for supportive services after placement into unsubsidized employment. Second, the paragraph's placement in the current

regulations in this section meant that grantees/sub-recipients were required to follow up with participants to determine if they needed supportive services. Although the Department strongly encourages follow-up with participants to support them in their unsubsidized employment, it is not required. (OAA sec. 502(c)(6)(A)(iv)).

We also propose to delete what is paragraph (a)(15) in the current regulations. That paragraph requires grantees/sub-recipients to follow up with former participants to determine whether that person was still employed. Although grantees/sub-recipients are still required to obtain retention data, it is not necessarily done by contacting the participant, nor is that a service provided to the participant, which is the subject of this section.

Paragraph (b) of this section remains unchanged. Paragraph (c) of this section states that grantees may not use SCSEP funds for individuals who only need job search assistance or job referral services. We propose to add to this paragraph a parenthetical reference to § 641.512, which provides that grantees cannot enroll job-ready participants, but must refer them to an employment provider such as the One-Stop Center for job placement assistance.

Finally, we propose several grammatical and technical corrections in this section.

What Types of Training May Grantees/Sub-Recipients Provide to SCSEP Participants in Addition to the Training Received at the Community Service Employment Assignment? (§ 641.540)

This section addresses the many forms that SCSEP training may take. Training received at the community service employment assignment is not within the scope of this section, however. The Department proposes to rephrase the heading accordingly, for clarity. For the same reason, we also propose to delete what appears in the current regulations as the last sentence of paragraph (a) of this section.

Paragraph (a) provides the conceptual framework for training. The Department proposes to add the phrase ''and that prepares them for unsubsidized employment'' to this paragraph because SCSEP training should advance the participant toward the goal of unsubsidized employment.

In paragraph (b), the Department proposes to replace training ''before or after placement in'' with ''prior to beginning or concurrent with'' a community service employment assignment. This change is consistent with statutory language at section 502(c)(6)(A)(ii) of the 2006 OAA, and clarifies that training may take place as soon as a participant has been assigned to a community service employment assignment even if the participant has not yet begun working at that assignment.

Since the current regulations were published, online training has become more common. In many cases quality training can be obtained in an online environment that allows individuals with transportation difficulties access to training. Therefore, the Department proposes to add ''online instruction'' to the list of the types of training allowable in paragraph (c) to clarify that such instruction is an allowable use of training funds.

The Department proposes to remove the following sentence which appears as paragraph (d) of this section in the current regulations: ''Grantees and sub-recipients are encouraged to place a major emphasis on training available through on-the-job experience.'' The Department proposes this change because secs. 502(b)(1)(I) and 502(c)(6)(A)(ii) of the 2006 OAA emphasize the importance of all types of training in the SCSEP, not only on-the-job training. What is paragraph (e) in the current regulations becomes proposed paragraph (d) and is unchanged.

The Department proposes to split what is paragraph (f) in the current regulations into two paragraphs. The first portion, addressing paying for training, becomes paragraph (e). We revise the language in paragraph (e) to mirror the language at section 502(c)(6)(A)(ii) of the 2006 OAA. The second portion, addressing wages during training, stands alone as the new paragraph (f). The Department also proposes to change the new paragraph (f), to state that participants ''must'' be paid wages while in training, to be consistent with the amended statute. (OAA sec. 502(b)(1)(I)). We also propose to add a reference to the paragraph of the proposed rule that describes participants' wages.

The Department proposes to broaden paragraph (g) to address supportive services generally, whereas the subject of this paragraph in the current regulations is, ''travel and room and board.'' We propose this change to conform with section 502(b)(1)(L) of the OAA. The Department encourages grantees and sub-recipients to seek outside sources of assistance to help provide supportive services to participants. We continue to say that a grantee/sub-recipient ''may'' pay for the costs of supportive services for two reasons: first, because we encourage grantees/sub-recipients to obtain supportive services from sources other than the grant whenever possible and second, because a grantee/sub-recipient is not required to provide supportive services when it determines that the supportive services would be too expensive, are not available, or would not be necessary to enable the participant to participate in the program. When a grantee/sub-recipient decides to approve supportive services, however, it must either pay for or obtain the services.

Paragraph (h) explains that in addition to training paid for by the SCSEP, participants may obtain training on their own, if they wish. We propose to clarify that any such training would be at the participant's own expense.

What Supportive Services May Grantees/Sub-Recipients Provide to Participants? (§ 641.545)

This section addresses the supportive services that grantees/sub-recipients may provide to participants. In paragraph (a), the Department proposes to replace ''supportive services to assist participants'' with ''supportive services that are necessary to enable an individual'' to successfully participate in SCSEP projects, to conform to language in secs. 502(c)(6)(A)(iv) and 518(a)(7) of the 2006 OAA. The Department interprets this revision in statutory language concerning the purpose of supportive services to be somewhat more prescriptive. That is, the supportive services that are appropriately provided by the SCSEP are those that are necessary to make it possible for an individual to participate in the SCSEP—not just any supportive service that would assist an individual to participate in the program. Indeed, we view the new language as conveying a tighter requirement that the supportive services be more directly related to the eventual employment goal.

At the same time, we also propose to change ''child and adult care'' to ''dependent care,'' ''temporary shelter'' to ''housing,'' and add needs-related payments, as examples of supportive services. These revisions are consistent with the language in OAA section 518(a)(7), and are chosen to be as inclusive as possible of all allowable supportive services. Therefore, while we interpret the purpose of SCSEP supportive services to be slightly narrower than in the past, the scope of available supportive services is slightly more expansive. We also propose to add to this paragraph a citation to the provision of the 2006 OAA that defines supportive services. Paragraph (b) remains unchanged.

We propose to add a paragraph (c) to this section, and move to it a revised

version of what appears in § 641.555(a) in the current regulations. Section 641.555(a) requires grantees to contact participants during the first six months following placement to determine their need for supportive services. In the proposed paragraph (c), the Department proposes to change ''must'' to ''are encouraged to,'' to clarify that there is no statutory requirement that grantees/sub-recipients follow-up with participants after they have been placed in unsubsidized employment. The statute allows such follow-up, however, and the Department strongly encourages it. Also in paragraph (c), the Department proposes to extend the time period during which grantees/sub-recipients may contact placed participants from 6 months to 12 months. We propose this change because one of the new additional SCSEP indicators of performance is retention in employment at one year; grantees/sub-recipients should be authorized to support placed participants in maintaining their employment throughout this one-year timeframe. The Department also proposes to change the word ''during'' to ''throughout'' in describing the 12 month period, to clarify that the Department prefers that grantees/sub-recipients not wait until 12 months have passed to contact a placed participant. Instead, we encourage grantees/sub-recipients to contact placed participants as often as necessary to ensure that they have the needed supportive services to maintain unsubsidized employment. SCSEP grantees/sub-recipients may utilize other organizations, including One-Stop partners, to contact the placed participants on behalf of the SCSEP, to determine if supportive services are necessary. SCSEP grantees/sub-recipients are authorized to pay for or arrange for necessary supportive services during this twelve month period.

What Responsibility Do Grantees/Sub-Recipients Have To Place Participants in Unsubsidized Employment? (§ 641.550)

This section outlines grantees'/sub-recipients' responsibility to place participants in unsubsidized employment. The Department proposes to change ''should'' to ''must,'' and ''reasonable efforts'' to ''every effort,'' in the proposed clause ''grantees and sub-recipients must make every effort to place participants into unsubsidized employment.'' We propose these changes to strengthen the emphasis on placement in unsubsidized employment, consistent with the 2006 OAA. The Department proposes to remove the phrase ''in accordance with each participant's IEP,'' which appears in the first sentence of this section in the current regulations, and the phrase that appears in the second sentence, ''whose IEPs include an unsubsidized employment placement goal,'' to emphasize that a goal for all of the SCSEP is to move participants into unsubsidized employment. Similarly, the Department proposes to remove the phrase ''as many as possible'' in the first sentence to again emphasize that unsubsidized employment is a goal for the SCSEP. Finally, the Department proposes to add the phrase ''and because the SCSEP limits the amount of time a participant can remain in the program'' to the first sentence because the 2006 OAA establishes a time limit for SCSEP participation that reinforces the responsibility to place participants in unsubsidized employment. (OAA sec. 518(a)(3)(B)).

What Responsibility Do Grantees Have to Participants Who Have Been Placed in Unsubsidized Employment? (§ 641.555 in the Current Regulations)

The Department proposes to remove this section from the regulations.

We propose to move what is paragraph (a) of this section, addressing grantees contacting placed participants to determine their need for supportive services, to § 641.545(c). Paragraph (b) of this section requires grantees to contact participants to obtain retention data. Paragraph (c) of this section states that subparts G and H of this part may include follow-up requirements. We propose to remove paragraphs (b) and (c) because grantees are not required to contact former participants to obtain retention data; retention information is generally obtained through other means.

May Grantees Place Participants Directly Into Unsubsidized Employment? (§ 641.560 in the Current Regulations)

In the current regulations, this section encourages grantees not to enroll individuals who could be placed directly into unsubsidized employment. The Department proposes to remove this section; this topic is now addressed in a new § 641.512 in this part.

What Policies Govern the Provision of Wages and Benefits to Participants? (§ 641.565)

The Department proposes significant substantive changes to this section required by revisions in section 502(c)(6)(A)(i) of the 2006 OAA. The Department also proposes to change the formatting of this section to outline form, rather than paragraphs containing multiple sentences, for clarity.

Paragraph (a) of this section addresses participant wages. In paragraph (a)(1)(i) we propose to delete the phrase ''required by the grantee/subgrantee'' after the word ''training'' because the 2006 OAA requires participants to be paid for all time spent in training. OAA section 502(b)(1)(I). Also, the SCSEP no longer uses the term ''required training.'' Although the program may in the past have considered training called for in the IEP to be ''necessary'' or ''required'' training, those terms are no longer employed. Indeed, under these proposed regulations all training provided by the SCSEP should be identified in the IEP. We also propose to remove the words ''work in'' before ''community service employment assignments'' because they are not needed in the amended language. We also propose to change ''minimum'' to ''required'' in the phrase, ''highest applicable required wage,'' because the prevailing rate of pay is not a minimum wage.

In proposed paragraph (a)(1)(ii) the Department states that grantees may pay participants for time spent on WIA intensive services. This policy is not new; it is stated in § 641.240(d) in the current regulations. However, we propose to move the provision so that it appears here, in the provision relating to wages.

Paragraph (a)(2) addresses the highest applicable required wage, and is essentially unchanged from the current regulations. The only change is to again change the word, ''minimum'' to ''required,'' in the phrase ''highest applicable required wage'' because the prevailing rate of pay is not a minimum wage.

In paragraph (a)(3), the Department proposes to add language to clarify the grantee's/sub-recipient's responsibility to make any necessary adjustments in minimum wage rates during the course of the grant term, should such a change be required by Federal, State, or local statute. Grantees are responsible for managing their funds well and enrolling only as many participants as they have the capacity to serve. In determining how many participants to enroll, grantees should make reasonable efforts to anticipate any likely adjustments in the minimum wage rates that may be required during the grant term.

Paragraph (b) of this section addresses benefits. The Department proposes to change the term ''Fringe Benefits'' to ''Benefits'' in the heading and remove ''fringe'' from the subheadings and in the text of the regulations. As discussed above, we propose this change throughout this part to reinforce the notion that the SCSEP is a temporary

training program as opposed to a more permanent employment situation, and to adhere to the same change in section 502(c)(6)(A) of the 2006 OAA.

The Department proposes to organize paragraph (b) to distinguish two categories of participant benefits: required and prohibited. These categories clearly communicate to grantees and sub-recipients both obligations and proscriptions. This organization is also consistent with language in the 2006 OAA. In the 2000 OAA, section 502(c)(6)(A)(i) merely described ''enrollee wages and fringe benefits (including physical examinations),'' but in the 2006 OAA the same section was expanded to mention various required and prohibited benefits.

Proposed paragraph (b)(1) addresses required benefits. Grantees/sub-recipients must provide such benefits as are required by law. Grantees should determine which benefits are required by law in their area(s) and should submit that information as part of their grant application.

Proposed paragraph (b)(1)(i) remains unchanged; in this paragraph we state that grantees/sub-recipients must provide benefits uniformly to all participants within a project or subproject. Proposed paragraph (b)(1)(ii) also remains unchanged, and provides that participants must be offered the opportunity to receive a physical examination annually. Proposed paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B), which further address physical examinations, also remain unchanged. We propose a new paragraph (b)(1)(ii)(C) in which we state that SCSEP funds may be used to pay the costs of the physical examinations. Some grantees and sub-recipients are able to obtain physical examinations at no cost, or locate other sources of assistance to pay for the examinations. The Department encourages this sort of leveraging of community resources. Nevertheless paying for the physical examinations with grant funds is an allowable SCSEP cost.

Proposed paragraph (b)(1)(iii) addresses workers' compensation law; this paragraph is unchanged from the current regulations. Proposed paragraph (b)(1)(iv) concerns unemployment compensation. If State law requires grantees/sub-recipients to provide unemployment compensation coverage, then clearly it would be a required benefit under the SCSEP. For that reason, and to be consistent with the treatment of unemployment compensation coverage by the 2006 OAA as a required benefit, we propose to move and revise the regulatory provision addressing unemployment compensation to this paragraph. In the current regulations this provision is located at paragraph (b)(4) of this section, and is phrased in the negative (''[u]nless required by law, grantees may not * * *''). We propose to place this provision at paragraph (b)(1)(iv) and state that if it is required by State law, then grantees/sub-recipients must provide unemployment compensation coverage. We note that where not required by State law, unemployment compensation coverage is not an allowable benefit.

The Department proposes to add a requirement at paragraph (b)(1)(v), in accordance with section 502(c)(6)(A)(i) of the 2006 OAA, requiring grantees and sub-recipients to provide compensation for scheduled work hours during which an employer's business is closed for a Federal holiday. For the limited purpose of implementing this provision, the Department proposes to interpret the word ''employer'' in section 502(c)(6)(A)(i) of the 2006 OAA to mean host agency. This interpretation will promote uniform treatment of SCSEP participants at the same host agency, regardless of which entity is the program operator.

The Department broadly interprets the word ''compensation'' in this context to allow for a variety of practices. Grantees/sub-recipients may compensate participants for scheduled work hours during which a host agency is closed for a Federal holiday by methods such as paying for the time a participant would have worked had it not been a Federal holiday (essentially a paid day off), or allowing a participant to make up the missed work hours on other days. Other methods of compensation may be allowable, but must be discussed in the grant application. Whatever the method of compensation offered, the compensation must be used within a reasonable period of time, and within the Program Year. Grantees and sub-recipients may develop policies that require the use of offered compensation sooner, for example, within a pay period; such policies must be described in the grant application.

The intent of the Department here is to allow flexibility in administering the SCSEP but prevent any carry-over of benefits from one Program Year to the next. For example, if a host agency is closed for Memorial Day, then a participant assigned to that host agency must be compensated for that Federal holiday. The participant may be paid. Alternatively, the participant may be allowed to work extra hours on other days to make up the missed time, but those extra hours must be worked before the Program Year ends on June 30, if not before. Because no benefits may be carried over to the next Program Year, if a participant is provided an opportunity to make up the time but is unable to do so by June 30, the participant may be paid for the time.

In paragraph (b)(1)(vi) the Department proposes that grantees and sub-recipients are required to provide necessary sick leave that is not part of an accumulated sick leave program, again in accordance with section 502(c)(6)(A)(i) of the 2006 OAA. The statute does not specify whether this sick leave must be paid or unpaid. Accordingly, the Department interprets the statute to allow either option, but requires grantees to explain their sick leave policy in their grant application. Necessary sick leave must be administered uniformly for all participants.

The Department interprets the word ''accumulate'' as meaning any storing of unused sick leave. Thus while it would be permissible for a grantee to have a policy allowing, say, six days of sick leave over the course of a Program Year, it would not be permissible for participants to ''earn'' a day of sick leave every two months and store the unused days. By way of another example, it would be permissible for a grantee to allow each participant one day a month of sick leave, as long as unused sick days did not store, or accumulate. We understand the sick leave contemplated by the statute to be sick leave that is either used or zeroed out at the end of the period provided in the grantee's leave policy but at least at the end of the Program Year (e.g., if the grantee's policy provides for one day of sick leave a month, the sick leave would be zeroed out at the end of the month; if the grantee's policy provides for 12 days of sick leave a year, the unused sick leave would be zeroed out at the end of the year). Again, grantees must explain their method of administering this required benefit in their grant application.

The Department proposes to consolidate the provisions addressing prohibited benefits into a new paragraph (b)(2) (in the current regulations benefit restrictions appear in paragraphs (b)(3) and (b)(4)) and expand the prohibitions in light of the 2006 OAA. Section 502(c)(6)(A)(i) of the 2006 OAA prohibits grantees from using SCSEP funds to pay the cost of pension benefits, annual leave, accumulated sick leave, and bonuses. Again, the Department's intent concerning these restrictions is to make compensation and benefits for SCSEP more consistent

with compensation and benefits received by participants in other time-limited training programs, rather than those in permanent employment situations. This is consistent with an increased emphasis on the goal of placing SCSEP participants in unsubsidized employment.

The Department also proposes to prohibit the carry over of allowable benefits from one Program Year to the next. This policy is not new to the SCSEP. It was promulgated in TEGL No. 29–04, dated April 18, 2005, and is designed to encourage participant self-sufficiency by discouraging participants from staying in the SCSEP indefinitely, thus preventing participation by other SCSEP-eligible individuals. We also propose to prohibit the payout of any unused benefits such as sick leave. This policy is consistent with the 2006 OAA's prohibition on paying the cost of accumulated sick leave, and supports the view of the SCSEP as a training program rather than a long-term employment situation.

The Department interprets section 502(c)(6)(A)(i) of the 2006 OAA as articulating which benefits are required, and which benefits are prohibited; no benefits other than the required benefits are allowable. Grantees/sub-recipients may not offer additional benefits to SCSEP participants. This interpretation of the statute is consistent with the Department's vision of the SCSEP as a temporary training opportunity.

Is There a Time Limit for Participation in the Program? (§ 641.570)

Section 518(a)(3)(B) of the 2006 OAA establishes a new time limit of 48 months for participation in the SCSEP, unless the Department authorizes an increased period of participation for particular participants. The 2006 OAA (sec. 502(b)(1)(c)) also requires SCSEP projects to manage their program such that the average participation period for all a project's participants is not greater than 27 months, unless an extension has been granted. The Department proposes to completely revise § 641.570 to reflect these statutory changes.

In the proposed paragraph (a), the Department describes the 48-month time limit required by section 518(a)(3)(B) of the 2006 OAA, and refers readers to paragraph (b) of this section which addresses increased periods of participation for certain individuals, as well as paragraph (c) of this section, which addresses the average participation cap. In paragraph (a) the Department requires grantees/sub-recipients to inform new participants of the time limit and possible extension at enrollment. However, grantees/sub-recipients should also notify current participants immediately, if they have not already done so, because the time limit began on July 1, 2007 for all participants enrolled as of that date.

The Department proposes a new paragraph (b) to provide the rules for requesting an exception to the 48-month participation limit for certain individuals. Section 518(a)(3)(B)(ii) of the 2006 OAA allows grantees to request to increase the period of participation for individuals who: have a severe disability; are frail or are age 75 or older; meet the eligibility requirements related to age for, but do not receive, benefits under title II of the Social Security Act; live in an area with persistent unemployment and have severely limited employment prospects; or have limited English proficiency or low literacy skills. The Department will authorize an increased period of participation up to an additional 12 months for any participant who meets one or more of these criteria. Each participant is eligible for one extension. The Department is proposing to implement the statutory extension as a one-per-participant, maximum one-year extension to ensure that participation is not indefinitely extended, thus preventing other eligible individuals from benefiting from the SCSEP. The 2006 OAA allows the average participation cap to be extended for an additional nine months (see § 641.570(c)(2)). The Department reasoned that if the average cap could only be extended by nine months, then the individual period of participation should not be increased beyond a year to limit the risk of exceeding the average participation cap.

The Department proposes a new paragraph (c) to implement the average participation cap set by section 502(b)(1)(C) of the 2006 OAA. Each SCSEP project must manage the participation period for its enrollees such that the average participation cap for all participants in the project does not exceed 27 months, or 36 months under the extension available in § 641.570(c)(2). The Department has determined that for the purposes of this paragraph, each SCSEP grantee (whether State or national) will be considered to have one project. That is, the average participation cap will be applied to the single, over-arching project, not to each local project independently. This is consistent with subpart G of this part, in which grantees are responsible for managing their various projects to achieve the expected levels of performance for the grant as a whole. This approach also affords grantees discretion to manage their sub-recipients and/or individual projects in whatever way best suits their circumstances, to realize the average participation cap.

The average participation cap must be achieved notwithstanding any individual extensions authorized pursuant to paragraph (b) of this section. That is, even if certain participants are allowed to remain in the program more than 48 months, each project must nevertheless satisfy the average participation cap for the project as a whole.

A grantee may request an extended period of average participation, if the grantee demonstrates in a request to the Department the existence of extenuating circumstances relating to the factors enumerated in section 513(a)(2)(D) of the 2006 OAA and listed in paragraph (c)(2) of this section. The Department may authorize an extended average period of not more than 36 months for a specific project area for a particular Program Year. OAA section 502(b)(1)(C)(ii).

Proposed paragraph (d) addresses the circumstance of an authorized break in participation. Some grantees have developed policies for authorized breaks in participation, to address situations such as when a suitable community service employment assignment is not available, or when a participant must take a leave of absence to attend to a loved one or for medical reasons. Such policies must be in writing and must be included in the grant application. The Department does not consider authorized breaks in participation, if taken pursuant to an approved grantee policy and entered into the SCSEP Performance and Results Quarterly Performance Reporting (SPARQ) system, to count against the individual participation limit or the average participation cap.

We propose to add a new paragraph (e), stating that we will issue administrative guidance detailing the processes by which a grantee may request an increased period of participation pursuant to paragraph (b) and by which a grantee may request an extended average participation cap pursuant to paragraph (c)(2).

Finally, in proposed paragraph (f), the Department provides grantees the authority to limit individual participation to a time period less than the 48 months required by statute and described in paragraph (a) of this section. To set a lower individual participation limit, grantees must specify and describe their proposed participation limit in their grant application. In addition, only lower participation limits that are uniformly

applied to all participants are acceptable.

May a Grantee/Sub-Recipient Establish a Limit on the Amount of Time Its Participants May Spend at Each Host Agency? (§ 641.575)

Consistent with the current regulations, the Department allows grantees to establish time limits on host agency assignments. In the proposed rule, however, we add a phrase to the first sentence of this section to encourage rotations among different host agencies, or among different assignments within the same host agency, as such rotations may increase participants' skills development and employment opportunities. The Department also proposes to change the second sentence to clarify that rotations should be consistent with, though not necessarily reflected in (as is the language used in the current regulations), the participants' IEPs. Finally, we note in this proposed section that neither the individual participation limit nor the average participation cap is impacted by host agency rotations. That is, a new host agency assignment does not ''re-start the clock'' for purposes of the individual participation limit or the average participation cap.

The Department encourages grantees that establish time limits to discuss this aspect of the program with participants, at least during orientation and preferably more often than that. Early and ongoing communication concerning host agency rotations is likely to decrease participants' anxieties about changing assignments.

Is There a Limit on Community Service Employment Assignment Hours? (§ 641.577)

This proposed new section limits the number of community service employment assignment hours to 1,300 per Program Year. Though this provision represents a change from the current regulations, a similar provision appeared in the 1995 final rule. In the 1995 rule, all paid time, including time spent on activities such as orientation and training, was limited to 1,300 hours per year. In the proposed rule, only hours spent at the community service employment assignment are subject to the 1,300-hour limit. This difference is meaningful because, consistent with the 2006 OAA and other aspects of this proposed rule, the proposed 1,300-hour limit does not discourage participant training. The Department wants to consistently encourage grantees and participants to utilize available resources to obtain training that will enhance participants' skills and employability. At the same time, the Department wants to make sure that the 1,300-hour limit does not significantly reduce the needed community services that participants provide, or the participants' opportunity to earn needed wages.

Further, a limit of 1,300 hours per year reinforces that SCSEP is meant to provide temporary, part-time community service employment assignments. It is our experience that most SCSEP grantees comply with the purpose of providing temporary, part-time employment assignments. The annual limit of 1,300 hours is well above the average hours worked per year by SCSEP participants, which is 20 hours a week for 52 weeks, or 1,040 hours. The proposed limitation will eliminate full-time and/or long-term assignments that are significantly above the hours worked by the average participant. A limit on the number of hours worked per year also promotes program efficiency by ensuring that grantees and sub-recipients do not spend a disproportionate amount of funds on some individual participants, limiting the participation of other eligible individuals in the program.

Under What Circumstances May a Grantee/Sub-Recipient Terminate a Participant? (§ 641.580)

This section addresses the various reasons for terminating a participant and describes the basic terminations procedures. The Department proposes several minor changes in this section to ensure consistency in termination proceedings, including consistently requiring that a grantee/sub-recipient ''must give the participant written notice explaining the reason(s) for termination.'' The current regulations use various phrasings to describe the written notice and do not require written notice in every case of termination.

Grantees/sub-recipients may serve only those individuals who are eligible for the SCSEP. Paragraphs (a), (b), and (c) of this section address situations in which participants are found not to be eligible for the program. In paragraph (a), describing termination based on false information, the Department proposes to add the word ''knowingly'' to clarify that the situation addressed by this paragraph is one where the participant knowingly furnished false information that leads to an incorrect eligibility determination. In the alternative, if a grantee/sub-recipient learns that a participant mistakenly provided incorrect information that may impact eligibility, the grantee/sub-recipient should verify the individual's eligibility. If the person is actually not eligible for the SCSEP, the grantee/sub-recipient must terminate the individual pursuant to § 641.580(b).

The Department proposes various changes in paragraph (b). This paragraph provides that if, during verification of eligibility, a grantee/sub-recipient determines that a participant is no longer eligible, the participant must be terminated. The ''must terminate'' in this paragraph is a change from the current regulations which allow that grantees ''may terminate'' such a participant. We propose this change because the SCSEP cannot serve ineligible individuals. The Department also proposes to broaden this paragraph to apply to eligibility issues in general, and not merely income eligibility as in the current regulations.

We propose to add the phrase, ''under § 641.505'' after the words ''eligibility verification,'' to refer to the section of this part that addresses when eligibility must be verified. We also propose to delete the word ''annual,'' because verification must be done at least once every twelve months but may also occur as circumstances require (see § 641.505). Finally, we clarify that the written notice of termination must be given to the participant within thirty days of the ineligibility determination. This is consistent with the content of what is § 641.510 in the current regulations; paragraph (b) of this section is silent on the timing of the notice in the current regulations.

The only change we propose to paragraph (c) is to add the words ''for termination'' after the word, ''reason(s),'' for clarity.

In paragraph (d), describing terminations for cause, the Department proposes to replace the phrase ''the proposed reasons for such terminations'' with ''their policies concerning for-cause terminations'' when describing what grantees must include in their grant applications, for clarity. We also propose to replace the word, ''discuss,'' with ''include,'' concerning submitting information on for-cause termination policies in the grant application, for clarity. The Department proposes to remove from paragraph (d) the discussion about communicating termination policies to participants, and proposes to create a new paragraph (g) to address that topic; the remaining paragraphs are re-lettered accordingly.

In paragraph (e), the Department proposes to add the requirement that grantees/sub-recipients must provide participants with written notice when they are terminated for repeated refusals to accept a job offer, so that the

termination is clearly communicated to the participant and in order to be consistent with the requirements for other terminations described in this section. We also propose to add that the termination must occur 30 days after the participant receives the written notice; this is consistent with other termination procedures in this section.

Proposed paragraph (f) provides that when an unfavorable eligibility determination is made pursuant to paragraphs (b) and (c), the grantee/sub-recipient should refer the terminated individual to other possible assistance sources such as the One-Stop Delivery System, and when a grantee/sub-recipient terminates a participant under paragraphs (d) and (e), it may refer the individual to other potential sources of assistance. The Department proposes to remove the redundant phrase ''it must give the individual a reason for termination'' from this paragraph because that requirement is now stated in each paragraph on termination. Also, we propose to delete the phrase, ''when feasible,'' because the Department determined that qualification was not necessary. Finally in paragraph (e), we propose to delete the reference to paragraph (a) because we determined that grantees and sub-recipients have no obligation to offer further assistance to an individual that knowingly provided false eligibility information.

In proposed paragraph (g) we rephrase the material that appears in paragraph (d) of this section in the current regulations, concerning communicating termination policies to participants. We propose to require grantees and sub-recipients to furnish a written copy of their termination policies to participants at enrollment, and to verbally review those policies with participants.

The Department proposes a technical correction to paragraph (h); we replace ''through (f)'' with ''through (e)'' when describing the paragraphs on terminations. Proposed paragraph (i) remains unchanged from what appears as paragraph (h) in the current regulations.

What Is the Employment Status of SCSEP Participants? (§ 641.585)

In the current regulations, §§ 641.585 and 641.590 address different aspects of the employment status of participants. The Department proposes to combine those two sections into a revised § 641.585; we propose to change the heading of the section accordingly.

In proposed paragraph (a), we state that SCSEP participants are not considered Federal employees solely due to their participation in the SCSEP; this statement is derived directly from section 504(a) of the 2006 OAA. The same notion is expressed in paragraph (a) of this section in the current regulations, although in different words (''[n]o, participants are not Federal employees'').

Proposed paragraph (b) contains the substance of what is § 641.590 in the current regulations. In the current regulations, we state that ''[g]rantees must determine if a participant is an employee of the grantee, local project, or host agency as the definition of 'employee' varies depending on the laws defining an employer/employee relationship.'' The first sentence of proposed paragraph (b) is a close parallel: ''[g]rantees must determine whether or not a participant qualifies as an employee of the grantee, sub-recipient, local project, or host agency, under applicable law.'' We propose to add ''sub-recipient'' to include all the possible employer entities. We propose to use the phrase, ''qualifies as,'' rather than the word ''is,'' for clarity. The phrase, ''under applicable law,'' is proposed to clearly give grantees authority to consider whatever law is relevant to their determination. We propose to change ''if'' to ''whether or not'' because a grantee may determine that participants are not employees of any of the listed entities.

In the current regulations, paragraph (b) of § 641.585 states that ''if a Federal agency is a grantee or host agency, § 641.590 applies.'' The Department proposes to keep the substance of that statement but revise the wording. In the second sentence of proposed paragraph (b) we state that the responsibility for making the employment status determination rests with the grantee even if a Federal agency is a grantee or host agency. That is, although SCSEP participants are not considered Federal employees by virtue of their participation in the SCSEP, whether a particular participant is a Federal employee because that participant's grantee or host agency is a Federal agency, is a matter to be determined by the grantee.

Are Participants Employees of the Grantee, the Local Project, and/or the Host Agency? (§ 641.590 in the Current Regulations)

The Department proposes to delete the section that appears as 641.590 in the current regulations, because the subject of that section—the employment status of participants—is now addressed in § 641.585.

*Subpart F—Pilot, Demonstration, and Evaluation Projects*

This subpart describes the opportunities for pilot, demonstration, and evaluation projects that are authorized under section 502(e) of the 2006 OAA. The former subpart F described ''502(e) projects'' which placed individuals in private sector job opportunities; the OAA now authorizes different types of projects. The proposed regulatory provisions largely reiterate the language in the 2006 OAA; however, proposed § 641.620 provides that additional guidance on implementation of these new projects will be issued administratively.

The Department interprets section 502(e)(2)(C) of the 2006 OAA, reiterated in § 641.630(c) of these proposed regulations, to mean that older individuals who are not SCSEP-eligible may participate in pilot and demonstration projects, but such pilot and demonstration projects must be designed to address the employment and training needs of SCSEP-eligible individuals. For example, older individuals who are not eligible for SCSEP may face challenges common to many older workers—e.g., skills that need to be upgraded (such as technology-related skills), disabilities or other health-related issues, lack of flexible work arrangements, or perceived age discrimination. Projects that propose to serve older individuals who are not eligible for the SCSEP must demonstrate that successful outcomes in their projects can result in strategies, models, or other tools or resources that can be replicated for the benefit of SCSEP-eligible participants. The Department will continue to explore how best to exercise this additional flexibility regarding pilot, demonstration, or evaluation projects.

*Subpart G—Performance Accountability*

Subpart G was published in an IFR, 72 FR 35832, June 29, 2007.

*Subpart H—Administrative Requirements*

Subpart H covers the administrative requirements that apply to all SCSEP grants. For the most part, the proposed regulations remain the same as the current regulations. However, the 2006 OAA necessitates several changes to this subpart, and the addition of a new § 641.874 setting forth conditions regarding a grantee's request to use additional funds for training and supportive service costs. We welcome comments on this new section and on other proposed changes to subpart H that are discussed in this preamble or on

other changes to this subpart which flow from the 2006 Amendments.

What Uniform Administrative Requirements Apply to the Use of SCSEP Funds? (§ 641.800)

There is no change to this provision.

What Is Program Income? (§ 641.803)

This section is substantively unchanged. The only change we propose to make to this section is the addition of new parenthetical descriptions of other regulations being referenced, and the revision of the parenthetical descriptions that appear in the current regulations, for clarity.

How Must SCSEP Program Income Be Used? (§ 641.806)

The program income provisions of this section address the application of the Department's uniform administrative requirements to SCSEP activities by indicating what types of income earned or generated by recipients and sub-recipients are considered program income, how the costs of producing program income are to be treated, and by directing recipients to follow the addition method described in 29 CFR 95.24 (non-profit and commercial organizations) and 29 CFR 97.25 (State and local governments) and add program income to Federal and non-Federal resources provided for SCSEP activities. The Department proposes to add a clarifying phrase to paragraph (a) to reflect the fact that program income must be used during the grant period in which it was earned, to be consistent with uniform administrative requirements. We also propose to add to paragraph (a) parenthetical descriptions by the references to other regulations, for clarity. We propose to clarify in paragraph (c) that the recipient has no obligation to the Department for program income earned after the end of the grant period. Finally, we propose certain grammatical corrections to this section.

What Non-Federal Share (Matching) Requirements Apply to the Use of SCSEP Funds? (§ 641.809)

This section sets forth the various matching fund requirements that apply to recipients of SCSEP funds and clarifies previously ambiguous language. We propose to add the phrase, ''allowable costs paid for with'' to paragraph (b) to clarify that, to be counted toward the ten percent non-Federal share, costs must be allowable. The regulatory provisions cited in paragraph (c) provide information concerning allowable costs.

The current regulations indicate that a recipient may not require a sub-recipient or host agency to provide non-Federal resources for the use of the SCSEP project as a condition of entering into a sub-recipient or host relationship. In paragraph (e), we propose to clarify that this does not preclude a sub-recipient or host agency from voluntarily contributing non-Federal resources for the use of the SCSEP project. Paragraph (f) in the current regulations states that the Department may pay all the costs of private sector training projects established in section 502(e); we delete this provision from the proposed rule because section 502(e) now relates to pilot, demonstration, and evaluation projects.

What Is the Period of Availability of SCSEP Funds? (§ 641.812)

This section details the period of availability of SCSEP funds and is substantively unchanged. In the current regulations, paragraph (b) states that SCSEP recipients must ensure that no sub-agreement provides for the expenditure of any SCSEP funds before July 1, or after the end of the grant period, except as provided in § 641.815. We propose to add a phrase to paragraph (b) to clarify that the July 1 at issue here is July 1 of the grant year.

May the Period of Availability Be Extended? (§ 641.815)

There is no change to this provision.

What Happens to Funds That Are Unexpended at the End of the Program Year? (§ 641.818 in the Current Regulations)

The Department proposes to delete the section that appears as 641.818 in the current regulations, because it relates to an internal Department process and is therefore not relevant for the rule.

What Audit Requirements Apply to the Use of SCSEP Funds? (§ 641.821)

There is no change to this provision.

What Lobbying Requirements Apply to the Use of SCSEP Funds? (§ 641.824)

There is no change to this provision.

What General Nondiscrimination Requirements Apply to the Use of SCSEP Funds? (§ 641.827)

In the current regulations, paragraph (b) of this section states that recipients and sub-recipients of SCSEP funds must comply with the Department's nondiscrimination requirements at 29 CFR part 37, for SCSEP activities that are administered in conjunction with the One-Stop Delivery System. We propose to add a phrase to paragraph (a) to clarify that DOL regulations regarding the equal treatment of religious organizations at 29 CFR part 2 subpart D also apply. We also propose, in paragraph (b)(1)(ii), to abbreviate ''the Workforce Investment Act'' to ''WIA.''

What Policies Govern Political Patronage? (§ 641.833)

There is no substantive change to this provision. We propose in paragraph (a) to abbreviate ''the Workforce Investment Act'' to ''WIA.'' We also propose to add the word, ''part'' before ''37'' to accurately reference the regulation.

What Policies Govern Political Activities? (§ 641.836)

The Department proposes to make only a few grammatical changes to this section.

What Policies Govern Union Organizing Activities? (§ 641.839)

There is no change to this provision.

What Policies Govern Nepotism? (§ 641.841)

We make no substantive changes to this section. In paragraph (a), we propose to replace the word ''position,'' with ''assignment,'' so that we use the term ''community service employment assignment,'' to be consistent with the language used in the rest of this part. In the second sentence of paragraph (a), we propose to move the phrase ''this requirement from'' to later in the sentence and change it to, ''from this requirement,'' for clarity.

What Maintenance of Effort Requirements Apply to the Use of SCSEP Funds? (§ 641.844)

This section outlines the maintenance of effort responsibilities of SCSEP recipients. Section 502(b)(1)(G) of the 2006 OAA consolidates and amends the previous statutory sections on which this regulatory section is based. Accordingly, we propose to revise this section to follow the statutory changes.

First, the Department proposes to replace the former paragraph (a) with a statement that a community service employment assignment is permissible only when the maintenance of effort requirements are met. Proposed paragraph (b) contains the specific maintenance of effort requirements. The first requirement is that the community service employment assignment must not reduce the number of job opportunities or vacancies that would otherwise be available to non-SCSEP persons. The 2006 OAA omits the prior statutory requirement, which is reflected in § 641.844(b)(1) of the

current regulations, that SCSEP projects must result in an increase in employment opportunities in addition to those that would otherwise be available. The next requirement is rephrased but is substantively the same as appears in the 2000 OAA and current regulations: a SCSEP project must not displace currently employed workers, including partial displacements. The third listed requirement is that a SCSEP project must not impair existing contracts or result in the substitution of Federal funds for other funds in connection with work that would otherwise be performed. The only proposed change in this requirement is that we drop the phrase, ''for service'' after the word ''contracts'' to be consistent with the language of the statute. The last requirement, concerning a SCSEP participant not performing the same or substantively the same work as a person on layoff, is substantively the same as what appeared in the 2000 OAA and is in the current regulations, but again is proposed to be slightly rephrased. Also, this requirement in the current regulations uses the term, ''participant,'' which we propose to change to the term, ''eligible individual,'' to be consistent with the language of the statute. We also propose to make a few formatting corrections.

What Uniform Allowable Cost Requirements Apply to the Use of SCSEP Funds? (§ 641.847)

This section is substantively unchanged. The only change the Department proposes to make to this section is the addition of parenthetical descriptions for referenced regulatory sections, for clarity.

Are There Other Specific Allowable and Unallowable Cost Requirements for the SCSEP? (§ 641.850)

The only proposed change to this section is found in paragraph (d), which provides that one allowable SCSEP cost is a SCSEP project's proportionate share of the costs of the local One-Stop Delivery System. The Department proposes to add a sentence to this paragraph to clarify that the cost of services provided, including such things as the wages and benefits of a SCSEP participant placed at a One-Stop Career Center, may constitute some or all of a SCSEP project's cost-sharing contribution.

How Are Costs Classified? (§ 641.853)

This section discusses whether costs are classified as administrative costs or programmatic activity costs and is substantively unchanged. The Department proposes two minor changes to this section. First, we propose to replace the term ''program costs,'' with the term ''programmatic activity costs'' to track a corresponding change in section 502(c)(6) of the 2006 OAA. Second, we propose to change the ''shall'' in the second sentence of paragraph (b) to ''must;'' ''must'' is a more appropriate word to use when requiring an action in a regulation.

What Functions and Activities Constitute Administrative Costs? (§ 641.856)

This section discusses the functions and activities that constitute administrative costs. To be consistent with the language of the 2006 OAA and the rest of this regulation, we propose to change the phrase, ''costs of administration,'' to ''administrative costs,'' in the heading and throughout this section. Pursuant to section 502(c)(4) of the 2006 OAA, we propose to add the following additional functions and activities as administrative costs: preparing administrative reports; other activities necessary for general administration of government funds and associated programs; and the costs of technical assistance, professional organization membership dues, and evaluating results obtained by the project involved against stated objectives. We also propose to delete the word, ''overall,'' from the phrase that appears in the current regulations, ''overall general administrative and coordination functions,'' to mirror the same change in section 502(c)(4)(A) of the 2006 OAA. Finally, the Department proposes to remove paragraph (c), the definition of ''first-tier sub-recipient,'' because the term has been replaced with ''program operator'' and that definition can be found in § 641.140. We do not intend for these changes to have a substantive effect on cost allocation.

What Other Special Rules Govern the Classification of Costs as Administrative Costs or Programmatic Activity Costs? (§ 641.859)

To make it easier to operate SCSEP activities within the WIA One-Stop Delivery System, the OAA imports the WIA cost classification system into the SCSEP. Accordingly, the current regulations divide costs into administrative costs and program costs (termed programmatic activity costs in the SCSEP); the same categories are continued in the proposed rule. As in other sections of these regulations, the Department proposes to change the phrase, ''program costs'' to ''programmatic activity costs'' to be consistent with the OAA (see, e.g., OAA sec. 502(c)(6)). We also propose to replace the phrase, ''first-tier sub-recipient,'' with ''program operator,'' as discussed in the definitions section of this preamble (§ 641.140).

We propose a few changes to paragraph (b). First, we propose to revise paragraph (b)(3) to state that the costs of sub-recipients and vendors performing administrative functions on behalf of recipients and program operators are classified as administrative costs. In the current regulations, only vendors are mentioned in paragraph (b)(3). We also propose to delete paragraph (b)(5) and combine its content into a revised paragraph (b)(4) that states that, except pursuant to paragraph (b)(3), costs incurred by all vendors, and only those sub-recipients below program operators, are classified as programmatic activity costs. In the current regulations, both (b)(4) and (b)(5) address activities that are classified as programmatic activity costs. We propose to make these changes to paragraph (b) for clarity, and to help ensure that entities that carry out the program functions of the SCSEP have access to administrative funds.

The only other change we propose to make to this section is in paragraph (d). Paragraph (d) addresses overhead or indirect cost pools. We clarify in the proposed paragraph (d) that that the allocable share of indirect or overhead costs for administrative and programmatic costs are to be in the same proportions as the actual costs for those activities which are included in the overhead or indirect cost pool. Because of reports that the language that appears in paragraph (d) in the current regulations is confusing, we have rewritten the text in an attempt at greater clarity; we do not intend to change the substance of the policy, merely our explication of it.

Must SCSEP Recipients Provide Funding for the Administrative Costs of Sub-Recipients? (§ 641.861)

There is no change to this section.

Section 502(b)(1)(R) of the 2006 OAA requires the Department to consult with grantees concerning what amount of administrative cost allocation is sufficient among recipients and sub-recipients. The Department has determined that it will determine the appropriate allocation on a grantee-by-grantee basis and that the process of grant application, review, and acceptance will be used to carry out the required consultation with each grantee. Grantees must include in their grant application their plans for allocating administrative monies; that is, grantees

must explain how much administrative money they intend to keep and how much they will be delegating. The Department is able to evaluate and respond to that information when it reviews the grant application. If the Department concludes, for example, that a grantee is not allocating sufficient administrative funds for sub-recipients, it could remand the application for further consideration by the applicant. The grantee could then respond with a revised allocation plan. The act of approving the grant application constitutes the conclusion of the consultation process.

What Functions and Activities Constitute Programmatic Activity Costs? (§ 641.864)

The Department defines programmatic activity costs pursuant to the new definition in section 502(c)(6)(A) of the OAA as amended in 2006. Programmatic activity costs now include the costs of (1) wages and benefits; (2) outreach, recruitment and selection, intake, orientation, and assessment functions; (3) participant training; (4) job placement assistance; and (5) participant supportive services.

We propose to revise paragraph (a) to track the wages and benefits costs authorized by statute. These are wages paid to participants, such benefits as are required by law (such as workers' compensation or unemployment compensation), the costs of physical examinations, compensation for scheduled work hours during which an employer's business is closed for a Federal holiday, and necessary sick leave that is not part of an accumulated sick leave program. As described in the preamble discussion of § 641.565(b), we interpret the latter provision to prohibit any storing of sick leave.

No amounts provided under the grant may be used to pay the cost of pension benefits, annual leave, accumulated sick leave, or bonuses, as described in § 641.565. Unlike the current regulations which permit some of these benefits, the Department is bound by the statute to prohibit the use of SCSEP funds for these purposes.

We propose a few changes to paragraph (c). First, we propose to add a reference to § 641.540, which addresses participant training. Also, we propose to specify that participant training may be provided prior to beginning or concurrent with a community service employment assignment. We propose to replace the phrase ''on the job'' with ''at a host agency,'' for increased clarity. The Department interprets the phrase ''participant training'' to mean only those costs that are directly related to participant training, and not activities such as general staff development that relate to participant training only indirectly or tangentially.

Finally, the Department proposes one change to paragraph (e). We propose to insert the phrase, ''to enable an individual to successfully participate in a SCSEP project,'' to mirror the language of section 502(c)(6)(A)(iv) of the 2006 OAA concerning what supportive services are allowable.

What Are the Limitations on the Amount of SCSEP Administrative Costs? (§ 641.867)

There is no change to this provision.

Under What Circumstances May the Administrative Cost Limitation Be Increased? (§ 641.870)

This section continues the Department's previous practice, as is described in the current regulations, of allowing increases in administrative cost limits as permitted under section 502(c)(3) of the OAA, if the recipient demonstrates that such an increase is necessary to carry out the project and that major administrative cost increases are being incurred in necessary program components. We propose to clarify in the proposed rule that payments for workers' compensation refers only to payments for staff; this is because workers' compensation payments made on behalf of participants are classified as programmatic activity costs.

Paragraph (a)(2)(iii) concerns projects that are so small that the amount of administrative expenses incurred to carry out the project necessarily exceeds 13.5 percent. We propose to make changes to the wording of this paragraph in accordance with corresponding changes in the language of the statute, but do not consider any of the changes substantive. Whereas the 2000 OAA referred to administrative ''expenses,'' the 2006 OAA now uses the term ''costs.'' Also, the 2000 OAA used the phrase, ''13.5 percent of the amount for such project,'' and the 2006 OAA instead says, ''13.5 percent of the grant amount.''

What Minimum Expenditure Levels Are Required for Participant Wages and Benefits? (§ 641.873)

As amended in 2006, section 502(c)(6)(B) of the OAA provides that grantees generally must use not less than 75 percent of the grant funds to pay participant wages and benefits. In paragraph (a) the Department proposes to add a reference to § 641.864(a), which addresses wage and benefit programmatic activity costs. We propose to specify in paragraph (b) that recipients must spend at least 75 percent of their total award amount on such costs, not 75 percent of their total expenditures, as is stated in the current regulations. In paragraph (c) we note that a SCSEP grantee may request approval to use additional funds for programmatic activity costs, pursuant to a new § 641.874. Finally, we propose to remove an obsolete reference to awards made under the former section 502(e) of the OAA.

What Conditions Apply to a SCSEP Grantee Request To Use Additional Funds for Training and Supportive Service Costs? (§ 641.874)

In this proposed section we implement a new provision at section 502(c)(6)(C) of the 2006 OAA, which allows a SCSEP grantee to submit to the Department a request for approval to use up to 10 percent of grant funds that would otherwise be devoted to wages and benefits under § 641.873 to provide participant training and supportive services. This new percentage (up to ten) is in addition to the 25 percent of funds that are otherwise available for administrative costs to support participant training, job placement assistance, participant supportive services, outreach, recruitment, selection, intake, orientation, and assessments; and thus reduces the minimum level for wages and benefits to 65 percent.

Proposed paragraph (a) tracks section 502(c)(6)(C)(i) of the 2006 OAA. Proposed paragraph (a)(3) addresses acceptable uses of the additional programmatic activity monies. Participant training is one acceptable use of the money; supportive services is the other. The Department interprets the phrase ''participant training'' to mean only those costs that are directly related to participant training, and not activities such as general staff development that relate to participant training only indirectly or tangentially. Also, as we noted in the preamble to § 641.545, the language used in the 2006 OAA to describe appropriate supportive services has changed to, ''supportive services that are necessary to enable an individual'' to successfully participate in a SCSEP project. This language is somewhat more prescriptive than the language in the 2000 OAA, which stated that the SCSEP could provide supportive services ''to assist an enrollee to successfully participate in a [SCSEP] project.''

In proposed paragraph (b) we detail the requirements for submission of a request to use additional funds for training and supportive service costs;

these requirements track those set out in the statute (OAA sec. 502(c)(6)(C)(ii)).

Section 502(c)(6)(C)(iii) of the 2006 OAA requires that grantees submit a request to use additional funds for training and supportive service costs not later than 90 days before the proposed date of implementation, and that the Department must act on the request no later than 30 days before the proposed date of implementation. The Department interprets these requirements as applying to requests to modify an existing grant agreement. We do not consider these timing requirements to apply to requests to use additional funds for training and supportive service costs that are contained in grant applications. Indeed, the practical reality of the SCSEP grant cycle is that grant application instructions are generally not issued early enough for grant applicants to be able to submit their applications 90 days before the beginning of the Program Year (July 1), and may not be acted on 30 days prior to the start of the Program Year. Were the Department to strictly enforce the 90 and 30 day deadlines, it would mean that grantees would be unable to implement the requested use of additional funds for programmatic activity costs until several weeks into the Program Year. Such a delay in implementation would harm participants by complicating the administrative management of the grant, by reducing the amount of funds available for training and supportive service costs, and by reducing the flexibility of grantees to use the funds as Congress intended.

Accordingly, if a grantee wishes to change its grant agreement to be able to use the additional moneys for training and supportive services, it must submit the request not later than 90 days before, and the Department will act on the request not later than 30 days before, the proposed date of implementation. If a request to use additional funds for training and supportive service costs is part of the grant application, the request will be reviewed and approved as a part of the normal grant approval process and will be implemented at the start of the Program Year.

Finally, we propose to state in paragraph (d) that grantees may apply this provision to individual sub-recipients but need not provide this opportunity to all their sub-recipients.

When Will Compliance With Cost Limitations and Minimum Expenditure Levels Be Determined? (§ 641.876)

There is no change to this provision.

What Are the Financial and Performance Reporting Requirements for Recipients? (§ 641.879)

This section covers the reporting requirements that are authorized by the 2006 OAA. We propose to remove a reference to reporting requirements for section 502(e) private sector employment projects, because reporting for all SCSEP recipients is now included in paragraph (a). In addition, proposed paragraph (a) now addresses financial reporting and proposed paragraph (b) addresses performance reporting, which conforms to the ordering in the heading question for this section. In the current regulations, paragraph (a) addresses performance reporting and paragraph (b) addresses financial reporting.

The Department proposes to add to paragraphs (a) and (b) parenthetical descriptions of the referenced regulatory sections. We propose to change the form number referenced in paragraph (a) because SCSEP grantees no longer use reporting form SF 269 for financial reporting; ETA Form 9130 is now the proper financial reporting form. And, whereas the former reporting instructions provided that financial reports were due in 30 days, the reporting instructions for the new ETA Form 9130 provides grantees with 45 days within which to submit each quarterly report, including the report for the last quarter. Under the ETA electronic reporting system, grantees are to mark their financial report for the last quarter of the grant as final which opens the link for a closeout final report which is due 90 days after the end of the grant period of performance; we propose to add the word ''closeout'' in the second sentence of paragraph (a) for clarity.

We propose to revise paragraph (b) to describe the current performance reporting procedure. Although the current regulations indicate that recipients must submit quarterly progress reports, those reports are actually generated by the Department using participant data that recipients submit electronically. Similarly, whereas the current regulations stress timely submission of reports, the proposed language emphasizes the timely submission of electronic participant data. We propose to delete the sentence that indicates that if a grant period ends on a date other than the last day of the Program Year, the final report is due within 90 days after the ending date of the grant. The Department collects data by Program Year, regardless of the grant period. Proposed paragraph (c) remains unchanged.

The Department notes that section 502(c)(6)(D) of the 2006 OAA requires each SCSEP grantee to annually prepare and submit to the Department a report documenting the grantee's use of funds for programmatic activities described in § 641.864. Because the financial and participant data already reported by grantees necessarily includes information on how the grantee uses its funds, including any funds for programmatic activities described in § 641.864, the Department interprets this new requirement as being fulfilled by the reports required in paragraphs (a) and (b) of this section.

Proposed paragraph (d) addresses reporting on the performance measures. We propose to revise the text of this paragraph slightly from what appears as paragraph (e) in the current regulations. Instead of requiring data and reports on, ''the program performance measures and the common performance measures,'' the proposed text requires data and reports on ''the performance measures,'' for simplicity and clarity. We also propose to change the reference to the specific sections of these regulations requiring performance measures, to a reference to subpart F generally, as all of subpart F addresses performance measures.

Proposed paragraph (e) of this section states that grantees may be required to collect and submit data on the demographic characteristics of participants. The only proposed change to this provision, which appears as paragraph (f) in the current regulations, is to change from the singular, ''this report,'' to the plural, ''these reports,'' in the second sentence, to be consistent with the plural ''reports'' in the first sentence. Starting in 2007, in addition to prior uses, the Department will also be using this data to prepare a report for Congress on the levels of participation and performance outcomes of minority individuals served by SCSEP, as required by section 515 of the 2006 OAA. The Department will not be requiring a new report from grantees. However, the Department may request additional information as part of the grant application process in order to complete its report to Congress.

We also propose to make grammatical and technical corrections.

What Are the SCSEP Recipient's Responsibilities Relating to Awards to Sub-Recipients? (§ 641.881)

This section specifies that the recipient is responsible for all SCSEP activities performed with SCSEP funds and for ensuring that sub-recipients comply with SCSEP requirements. We propose to change paragraphs (a) and (b) to (b) and (c). We propose to add a new paragraph (a) to state that recipients are

responsible for ensuring all sub-awards are made on the basis of full and open competition to the maximum extent practicable in accordance with procurement requirements in 29 CFR 95.43 (non-profit and commercial organizations) and 29 CFR 97.36 (State and local governments). These are uniform administrative requirements, applicable to all Department grants.

The parenthetical at the end of paragraph (b) refers to the statutory section on responsibility tests; we propose to add a reference to the section of these regulations addressing the responsibility tests, for clarity. Proposed paragraph (c), which appears as paragraph (b) in the current regulations, remains unchanged. We propose to add a new paragraph (d) to conform to the requirements of section 514(e) of the 2006 OAA relating to the special consideration that national grantees serving a service area where a substantial population of individuals with barriers to employment exists must afford in selecting sub-recipients. Section 514(e)(1) of the 2006 OAA provides that for purposes of this section ''individuals with barriers to employment'' means minority individuals, Indian individuals, individuals with greatest economic need, and individuals who are most-in-need. The term most-in-need is defined in the portion of § 641.140 that was included in the IFR published at 72 FR 35832, Jun. 29, 2007.

What Are the Grant Closeout Procedures? (§ 641.884)

The Department proposes to add parenthetical descriptions for the regulatory references provided. Otherwise there is no change to this section.

*Subpart I—Grievance Procedures and Appeals Process*

Subpart I describes the grievance procedures required of grantees, and the Department's appeal process for grant applicants and grantees. With two exceptions these provisions are substantively identical to the provisions in the current regulations.

What Appeal Process Is Available to an Applicant That Does Not Receive a Grant? (§ 641.900)

This section describes the appeal process that is available to an applicant that does not receive a grant. We propose to revise the text of this section to more accurately reflect the current process actually used by the Department for applications that are not funded. An applicant may request feedback from the Department concerning a decision not to award a grant to the applicant, but debriefings are no longer provided. Under the current process, non-selected entities that request an explanation are provided with feedback on the shortcomings of their proposal. An applicant that wishes to appeal must file their appeal within 21 days of either the notification that financial assistance would not be awarded or the Grant Officer's feedback on the proposal. Under the current regulations, an applicant is required to request that the Grant Officer provide the reasons for not awarding financial assistance in order to preserve the right to appeal. Under this proposed section, an applicant may file an appeal within 21 days of the notification that an award was not given; requesting an explanation from the Grant Officer is not a necessary step to preserving the right to appeal.

The Department also proposed to modify two timeframes. Under the current regulations, the Grant Officer has 20 days within which to provide a debriefing and a written decision explaining the reasons for the decision. In the proposed section, the Grant Officer has 21 days to provide feedback concerning the proposal. Under the current regulations, a party dissatisfied with the decision of the Administrative Law Judge has 20 days within which to file a petition for review. We propose to change that timeframe to 21 days. We propose these timeframe changes to be consistent with the 21-day timeframe used in other circumstances in this section. We also propose to make technical corrections.

What Grievance Procedures Must Grantees Make Available to Applicants, Employees, and Participants? (§ 641.910)

Paragraph (c) of this section formerly required that any allegation of a Federal law violation be filed with the Chief of the Division of Older Worker Programs. Due to a reorganization within ETA, such an allegation will now be filed with the Chief of the Division of Adult Services. We also propose to make technical corrections to this section.

What Actions of the Department May a Grantee Appeal and What Procedures Apply to Those Appeals? (§ 941.920)

We propose to delete the sentence, ''[t]he Chief Administrative Law Judge will designate an Administrative Law Judge to hear the appeal,'' from paragraph (d)(1) as it is unessential to these regulations. The only other changes we propose in this section are technical corrections.

Is There an Alternative Dispute Resolution Process That May Be Used in Place of an OALJ Hearing? (§ 641.930)

The only changes we propose in this section are technical ones.

**III. Administrative Information**

*Regulatory Flexibility Analysis, Executive Order 13272, Small Business Regulatory Enforcement Fairness Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. chapter 6, requires the Department to evaluate the economic impact of this proposed rule with regard to small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Department must determine whether the rule imposes a significant economic impact on a substantial number of such small entities.

First, the Department has determined that this NPRM does not affect a substantial number of small entities. There are about 900 SCSEP grantees, sub-recipients, and sub-sub-recipients. Of these, 50 are States and are not small entities as defined by the RFA. The vast majority of the rest are non-profit organizations that would be categorized as small entities for RFA purposes. However, even if all of the rest (850) are small non-profit organizations, that is simply not a substantial number. Eight hundred and fifty is less than one percent of the total number of non-profits in the country, which has been estimated to be over 1 million. Accordingly, we conclude that this proposes rule does not affect a substantial number of small entities.

The Department has also determined that the economic impact of this proposed rule is not significant because these regulations will not result in any additional costs to grantees. The SCSEP is designed such that SCSEP funds cover the vast majority of the costs of implementing this program. Subpart H of this proposed rule provides detailed information to grantees on what costs are proper program expenditures, how to properly categorize those costs, etc. The SCSEP statute does require a ten percent non-Federal match (*see* § 641.809); however, the ten percent match requirement has been in effect in previous SCSEP regulations and therefore does not constitute a new economic burden on grantees. (We note that the Department allows in-kind contributions in lieu of monetary payments, which significantly moderates the economic impact of the match requirement.) Accordingly, the Department certifies that this proposed

rule will not have a significant economic impact on a substantial number of small entities. The Department welcomes comments on this RFA certification.

We note that this analysis is also applicable under Executive Order 13272; for those purposes as well we certify that this proposed rule does not impose a significant economic impact on a substantial number of small entities.

The Department has also determined that this rule is not a ''major rule'' for purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. chapter 8. SBREFA requires agencies to take certain actions when a ''major rule'' is promulgated. SBREFA defines a ''major rule'' as one that will have an annual effect on the economy of $100,000,000 or more; that will result in a major increase in costs or prices for, among other things, State or local government agencies; or that will significantly and adversely effect the business climate.

This proposed rule will not significantly or adversely effect the business climate. First, the proposed rule will not create a significant impact on the business climate at all because, as discussed above, SCSEP grantees are governmental jurisdictions and not-for-profit enterprises. Moreover, any secondary impact of the program on the business community would not be adverse. To the contrary, the SCSEP functions to assist the business community by training older Americans to participate in the workforce.

The proposed rule will also not result in a major increase in costs or prices for States or local government agencies. The SCSEP has no impact on prices, and, as discussed above, the only costs that could potentially be borne by governmental jurisdictions are limited to the ten percent matching share. Finally, this proposed rule will not have an annual effect on the economy of $100,000,000 or more.

Therefore, because none of the definitions of ''major rule'' apply in this instance, we determine that this proposed rule is not a ''major rule'' for SBREFA purposes.

*Executive Order 12866*

Executive Order 12866 requires that for each ''significant regulatory action'' proposed by the Department, the Department conduct an assessment of the proposed regulatory action and provide OMB with the proposed regulation and the requisite assessment prior to publishing the regulation. A significant regulatory action is defined to include an action that will have an annual effect on the economy of $100 million or more, as well as an action that raises a novel legal or policy issue.

As discussed with regard to the SBREFA analysis, this proposed rule will not have an annual effect on the economy of $100 million or more. However, the rule does raise novel policy issues concerning implementing the 2006 OAA in the SCSEP. The key policy changes that are being implemented include the introduction of a 48-month limit on participation, institution of a regular competition for national grants, and an increase in the proportion of grant funds that can be used for participant training and supportive services. Therefore, the Department has submitted this proposed rule to the OMB.

*Paperwork Reduction Act*

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, include minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise the collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information.

Because the 2006 OAA necessitated changes in many of the SCSEP forms used by grantees until now, in July 2007 the Department submitted to OMB for review and approval in accordance with section 3507(d) of the PRA a modification to the SCSEP information collection requirements. The four-year strategy newly required by the 2006 OAA (see § 641.302) was accounted for in that PRA submission. The SCSEP PRA submission was assigned OMB control number 1205–0040 and was approved by OMB in October 2007. The approval expires October 31, 2010. The following proposed rule neither introduces new nor revises any existing information collection requirements.

*Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995, this NPRM does not include any Federal mandate that may result in increased expenditure by State, local, and tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

*Executive Order 13132*

The Department has reviewed this NPRM in accordance with Executive Order 13132 regarding federalism and has determined that it does not have ''federalism implications.'' The rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' While States are SCSEP grantees, the requirements in this NPRM flow directly from the 2006 OAA and thus do not constitute a ''substantial direct effect'' on the States, nor will it alter the relationship, power, or responsibilities between the Federal and State governments.

*Executive Order 13045*

Executive Order 13045 concerns the protection of children from environmental health risks and safety risks. This NPRM addresses the SCSEP, a program for older Americans, and has no impact on safety or health risks to children.

*Executive Order 13175*

Executive Order 13175 addresses the unique relationship between the Federal Government and Indian tribal governments. The order requires Federal agencies to take certain actions when regulations have ''tribal implications.'' Required actions include consulting with tribal governments prior to promulgating a regulation with tribal implications and preparing a tribal impact statement. The order defines regulations as having ''tribal implications'' when they have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Department has reviewed this NPRM and concludes that it does not have tribal implications. While tribes are sub-recipients of national SCSEP grantees, this proposed rule will not have a substantial direct effect on those tribes, because, as outlined in the Regulatory Flexibility section of the preamble, there are no new costs associated with implementing this proposed rule. This regulation does not affect the relationship between the Federal Government and the tribes, nor does it affect the distribution of power and responsibilities between the Federal Government and tribal governments.

Accordingly, we conclude that this rule does not have tribal implications for the purposes of Executive Order 13175.

*Environmental Impact Assessment*

The Department has reviewed this NPRM in accordance with the requirements of the National

Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department's NEPA procedures (29 CFR part 11). The NPRM will not have a significant impact on the quality of the human environment, and, thus, the Department has not prepared an environmental assessment or an environmental impact statement.

*Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681), requires the Department to assess the impact of this rule on family well-being. A rule that is determined to have a negative affect on families must be supported with an adequate rationale.

The Department has assessed this NPRM and determines that it will not have a negative effect on families. Indeed, we believe the SCSEP strengthens families by providing job training and support services to low-income older Americans.

*Executive Order 12630*

This NPRM is not subject to Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

*Executive Order 12988*

This regulation has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

*Executive Order 13211*

This NPRM is not subject to Executive Order 13211, because it will not have a significant adverse effect on the supply, distribution, or use of energy.

*Plain Language*

The Department drafted this rule in plain language.

**List of Subjects in 20 CFR Part 641**

Aged, Employment, Government contracts, Grant programs—Labor, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Department of Labor proposes to amend 20 CFR part 641 to read as follows:

## PART 641—PROVISIONS GOVERNING THE SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM

1. The authority citation for part 641 continues to read as follows:

**Authority:** 42 U.S.C. 3056 *et seq.*

### Subpart A—[Amended]

2. Revise § 641.100 to read as follows:

#### § 641.100 What does this part cover?

Part 641 contains the Department of Labor's regulations for the Senior Community Service Employment Program (SCSEP), authorized under the title V of the Older Americans Act (OAA), 42 U.S.C. 3056 *et seq.*, as amended by the Older Americans Act Amendments of 2006, Public Law 109–365. This part, and other pertinent regulations expressly incorporated by reference, set forth the regulations applicable to the SCSEP.

(a) Subpart A of this part contains introductory provisions and definitions that apply to this part.

(b) Subpart B of this part describes the required relationship between the OAA and the Workforce Investment Act of 1998 (WIA), 29 U.S.C. 2801 *et seq.* These provisions discuss the coordinated efforts to provide services through the integration of the SCSEP within the One-Stop Delivery System.

(c) Subpart C of this part sets forth the requirements for the State Plan, such as the four-year strategy, required coordination efforts, public comments, and equitable distribution.

(d) Subpart D of this part establishes grant planning and application requirements, including grantee eligibility, and responsibility review provisions that apply to the Department's award of SCSEP funds for State and National grants.

(e) Subpart E of this part details SCSEP participant services.

(f) Subpart F of this part provides the rules for pilot, demonstration, and evaluation projects.

(g) Subpart G of this part outlines the performance accountability requirements. This subpart establishes requirements for performance measures, defines such measures, and establishes corrective actions for failure to meet core performance measures.

(h) Subpart H of this part sets forth the administrative requirements for SCSEP funds.

(i) Subpart I of this part describes the grievance and appeals processes and requirements.

3. Revise § 641.110 to read as follows:

#### § 641.110 What is the SCSEP?

The Senior Community Service Employment Program (SCSEP) is a program administered by the Department of Labor that serves unemployed low-income persons who are 55 years of age and older and who have poor employment prospects by training them in part-time community service employment assignments and by assisting them in developing skills and experience to facilitate their transition to unsubsidized employment.

4. Revise § 641.120 to read as follows:

#### § 641.120 What are the purposes of the SCSEP?

The purposes of the SCSEP are to foster individual economic self-sufficiency and promote useful part-time opportunities in community service employment assignments for unemployed low-income persons who are 55 years of age or older, particularly persons who have poor employment prospects, and to increase the number of older persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors. (OAA sec. 502(a)(1)).

5. Revise § 641.130 to read as follows:

#### § 641.130 What is the scope of this part?

The regulations in this part address the requirements that apply to the SCSEP. More detailed policies and procedures are contained in administrative guidelines issued by the Department. Throughout this part, phrases such as, ''according to instructions (procedures) issued by the Department'' or ''additional guidance will be provided through administrative issuance'' refer to the documents issued under the Secretary's authority to administer the SCSEP, such as Training and Employment Guidance Letters (TEGLs), Training and Employment Notices (TENs), previously issued SCSEP Older Worker Bulletins that are still in effect, technical assistance guides, and other SCSEP guidance.

6. Amend § 641.140 by:

a. Removing the definitions ''Co-enrollment,'' ''Placement into public or private unsubsidized employment,'' ''Retention in public or private unsubsidized employment,'' ''State Workforce Agency,'' and ''Subgrantee.''

b. Revising the definitions ''Authorized position level,'' ''Community service,'' ''Equitable distribution report,'' ''Grantee,'' ''Greatest economic need,'' ''Greatest

social need,'' ''Host agency,'' ''Indian,'' ''Indian tribe,'' ''Individual employment plan or IEP,'' ''Jobs for Veterans Act,'' ''OAA,'' ''Other participant (enrollee) costs,'' ''Participant,'' ''Poor employment prospects,'' ''Program year,'' ''Project,'' ''Recipient,'' ''Service area,'' ''State grantee,'' ''State Plan,'' ''Sub-recipient,'' ''Title V of the OAA,'' ''Tribal organization,'' and ''Workforce Investment Act or WIA,'' to read as set forth below.

c. Adding in alphabetical order the definitions ''Pacific Island and Asian Americans,'' ''Program operator,'' ''Secretary,'' ''Supportive services,'' and ''Unemployed,'' as set forth below.

**§ 641.140 What definitions apply to this part?**

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*Authorized position level* means the number of SCSEP enrollment opportunities that can be supported for a 12-month period based on the average national unit cost. The authorized position level is derived by dividing the total amount of funds appropriated for a Program Year by the national average unit cost per participant for that Program Year as determined by the Department. The national average unit cost includes all costs of administration, other participant costs, and participant wage and benefit costs as defined in section 506(g) of the OAA.

*Community service* means:

(a) Social, health, welfare, and educational services (including literacy tutoring), legal and other counseling services and assistance, including tax counseling and assistance and financial counseling, and library, recreational, and other similar services;

(b) Conservation, maintenance, or restoration of natural resources;

(c) Community betterment or beautification;

(d) Antipollution and environmental quality efforts;

(e) Weatherization activities;

(f) Economic development; and

(g) Other such services essential and necessary to the community as the Secretary determines by rule to be appropriate. (OAA sec. 518(a)(1)).

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*Equitable distribution report* means a report based on the latest available Census data which lists the optimum number of participant positions in each designated area in the State, and the number of authorized participant positions each grantee serves in that area, taking the needs of underserved jurisdictions into account. This report provides a basis for improving the distribution of SCSEP positions.

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*Grantee* means an entity receiving financial assistance directly from the Department to carry out SCSEP activities. The grantee is the legal entity that receives the award and is legally responsible for carrying out the SCSEP, even if only a particular component of the entity is designated in the grant award document. Grantees include public and nonprofit private agencies and organizations, agencies of a State, tribal organizations, and Territories, that receive SCSEP grants from the Department. (OAA secs. 502(b)(1), 506(a)(2)). As used here, ''grantee'' includes ''grantee'' as defined in 29 CFR 97.3 and ''recipient'' as defined in 29 CFR 95.2(gg).

*Greatest economic need* means the need resulting from an income level at or below the poverty guidelines established by the Department of Health and Human Services and approved by the Office of Management and Budget (OMB). (42 U.S.C. 3002(23)).

*Greatest social need* means the need caused by non-economic factors, which include: physical and mental disabilities; language barriers; and cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, that restricts the ability of an individual to perform normal daily tasks or threatens the capacity of the individual to live independently. (42 U.S.C. 3002(24)).

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*Host agency* means a public agency or a private nonprofit organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 which provides a training work site and supervision for one or more participants. Political parties cannot be host agencies. A host agency may be a religious organization as long as the projects in which participants are being trained do not involve the construction, operation, or maintenance of any facility used or to be used as a place for sectarian religious instruction or worship. (OAA sec. 502(b)(1)(D)).

*Indian* means a person who is a member of an Indian tribe. (42 U.S.C. 3002(26)).

*Indian tribe* means any tribe, band, nation, or other organized group or community of Indians (including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*) which: (1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or (2) is located on, or in proximity to, a Federal or State reservation or rancheria. (42 U.S.C. 3002(27)).

*Individual employment plan or IEP* means a plan for a participant that is based on an assessment of that participant conducted by the grantee or sub-recipient, or a recent assessment or plan developed by another employment and training program, and a related service strategy. The IEP must include an appropriate employment goal, objectives that lead to the goal, a timeline for the achievement of the objectives; and be jointly agreed upon with the participant. (OAA sec. 502(b)(1)(N)).

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*Jobs for Veterans Act* means Public Law 107–288 (2002). Section 2(a) of the Jobs for Veterans Act, codified at 38 U.S.C. 4215(a), provides a priority of service for Department of Labor employment and training programs for veterans, and certain spouses of veterans, who otherwise meet the eligibility requirements for participation. Priority is extended to veterans. Priority is also extended to the spouse of a veteran who died of a service-connected disability; the spouse of a member of the Armed Forces on active duty who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power; the spouse of any veteran who has a total disability resulting from a service-connected disability; and the spouse of any veteran who died while a disability so evaluated was in existence. (See § 641.520(b)).

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*OAA* means the Older Americans Act, 42 U.S.C. 3001 *et seq.*, as amended.

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*Other participant (enrollee) costs* means the costs of participant training, including the payment of reasonable costs to instructors, classroom rental, training supplies, materials, equipment, and tuition, and which may be provided on the job, prior to or concurrent with a community service employment assignment, in a classroom setting, or under other appropriate arrangements; job placement assistance, including job development and job search assistance; participant supportive services to enable a participant to successfully participate in a project, including the payment of reasonable costs of transportation, health care and medical services, special job-related or personal counseling, incidentals (such as work shoes, badges, uniforms, eyeglasses, and tools), child and adult care, temporary shelter, and follow-up services; and outreach, recruitment and selection,

intake orientation, and assessments. (OAA sec. 502(c)(6)(A)).

*Pacific Island and Asian Americans* means Americans having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. (OAA sec. 518(a)(5)).

*Participant* means an individual who is determined to be eligible for the SCSEP, is given a community service employment assignment, and is receiving any service funded by the program as described in subpart E.

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*Poor employment prospects* means the likelihood that an individual will not obtain employment without the assistance of the SCSEP or another workforce development program. Persons with poor employment prospects have a significant barrier to employment; significant barriers to employment include but are not limited to: Lacking a substantial employment history, basic skills, and/or English-language proficiency; lacking a high school diploma or the equivalent; having a disability; being homeless; or residing in socially and economically isolated rural or urban areas where employment opportunities are limited.

*Program operator* means a sub-recipient that receives SCSEP funds from a SCSEP grantee or a higher-tier SCSEP sub-recipient and performs the following activities for all its participants: eligibility determination, participant assessment, and development of and placement into community service employment assignments.

*Program Year* means the one-year period beginning on July 1 and ending on June 30.

*Project* means an undertaking by a grantee or sub-recipient in accordance with a grant or contract agreement that provides service to communities and training and employment opportunities to eligible individuals.

*Recipient* means grantee. As used here, ''recipient'' includes ''recipient'' as defined in 29 CFR 95.2(gg) and ''grantee'' as defined in 29 CFR 97.3.

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*Secretary* means the Secretary of the Department of Labor.

*Service area* means the geographic area served by a local SCSEP project in accordance with a grant agreement.

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*State grantee* means the entity designated by the Governor, or the highest government official, to enter into a grant with the Department to administer a State or Territory SCSEP project under the OAA. Except as applied to funding distributions under section 506 of the OAA, this definition applies to the 50 States, Puerto Rico, the District of Columbia and the following Territories: Guam, American Samoa, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

*State Plan* means a plan that the Governor, or the highest government official, of a State must submit to the Secretary that outlines a four-year strategy, and describes the planning and implementation process, for the statewide provision of community service and other authorized activities for eligible individuals under SCSEP. (See § 641.300).

*Sub-recipient* means the legal entity to which a sub-award of financial assistance is made by the grantee (or by a higher-tier sub-recipient), and that is accountable to the grantee for the use of the funds provided. As used here, ''sub-recipient'' includes ''sub-grantee'' as defined in 29 CFR 97.3 and ''sub-recipient'' as defined in 29 CFR 95.2(kk).

*Supportive services* mean services, such as transportation, child care, dependent care, housing, and needs-related payments that are necessary to enable an individual to participate in activities authorized under the SCSEP. (OAA sec. 518(a)(7)).

*Title V of the OAA* means 42 U.S.C. 3056 *et seq.*, as amended.

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*Tribal organization* means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body. (42 U.S.C. 3002(54)).

*Unemployed* means an individual who is without a job and who wants and is available for work, including an individual who may have occasional employment that does not result in a constant source of income. (OAA sec. 518(a)(8)).

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*Workforce Investment Act or WIA* means the Workforce Investment Act of 1998 (Pub. L. 105–220 [Aug. 7, 1998]), 29 U.S.C. 2801 *et seq.*, as amended.

* * * * *

7. Revise subparts B through F of part 641 to read as follows:

### Subpart B—Coordination With the Workforce Investment Act

Sec.



### Subpart C—The State Plan



### Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants

## Subpart B—Coordination With the Workforce Investment Act

### § 641.200 What is the relationship between the SCSEP and the Workforce Investment Act?

The SCSEP is a required partner under the Workforce Investment Act. As such, it is a part of the One-Stop Delivery System. SCSEP grantees/sub-recipients are required to follow all applicable rules under WIA and its regulations. (29 U.S.C. 2841(b)(1)(B)(vi) and 29 CFR 662.200 through 662.280).

### § 641.210 What services, in addition to the applicable core services, must SCSEP grantees/sub-recipients provide through the One-Stop Delivery System?

In addition to providing core services, as defined at 20 CFR 662.240 of the WIA regulations, SCSEP grantees/sub-recipients must make arrangements through the One-Stop Delivery System to provide eligible and ineligible individuals with referrals to WIA intensive and training services and access to other activities and programs carried out by other One-Stop partners.

### § 641.220 Does title I of WIA require the SCSEP to use OAA funds for individuals who are not eligible for SCSEP services or for services that are not authorized under the OAA?

No, SCSEP requirements continue to apply. Title V resources may not be used to serve individuals who are not SCSEP-eligible. The Workforce Investment Act creates a seamless service delivery system for individuals seeking workforce development services by linking the One-Stop partners in the One-Stop Delivery System. Although the overall effect is to provide universal access to core services, SCSEP resources may only be used to provide services that are authorized and provided under the SCSEP to eligible individuals. (Note, however, that one allowable SCSEP cost is a SCSEP project's proportionate share of One-Stop costs; see § 641.850(d).) Title V funds can be used to pay wages to SCSEP participants receiving intensive and training services under title I of WIA provided that the SCSEP participants have each received a community service employment assignment. All other individuals who are in need of the services provided under the SCSEP, but who do not meet the eligibility criteria to enroll in the SCSEP, should be referred to or enrolled in WIA or other appropriate partner programs. (29 U.S.C. 2841(b)(1)). These arrangements should be negotiated in the Memorandum of Understanding (MOU), which is an agreement developed and executed between the Local Workforce Investment Board, with the agreement of the chief local elected official, and the One-Stop partners relating to the operation of the One-Stop Delivery System in the local area. The MOU is further described in the WIA regulations at §§ 662.300 and 662.310 of this title.

### § 641.230 Must the individual assessment conducted by the SCSEP grantee/sub-recipient and the assessment performed by the One-Stop Delivery System be accepted for use by either entity to determine the individual's need for services in the SCSEP and adult programs under title I–B of WIA?

Yes, section 502(b)(3) of the OAA provides that an assessment or IEP completed by the SCSEP satisfies any condition for an assessment, service strategy, or IEP completed at the One-Stop and vice-versa. (OAA sec. 502(b)(3)). These reciprocal arrangements and the contents of the SCSEP IEP and WIA IEP should be negotiated in the MOU.

### § 641.240 Are SCSEP participants eligible for intensive and training services under title I of WIA?

(a) Although SCSEP participants are not automatically eligible for intensive and training services under title I of WIA, Local Boards may deem SCSEP participants, either individually or as a group, as satisfying the requirements for receiving adult intensive and training services under title I of WIA.

(b) SCSEP participants who have been assessed and for whom an IEP has been developed have received an intensive service according to 20 CFR 663.240(a) of the WIA regulations. In order to enhance skill development related to the IEP, it may be necessary to provide training beyond the community service employment assignment to enable participants to meet their unsubsidized employment objectives. The SCSEP grantee/sub-recipient, the host agency, the WIA program, or another One-Stop partner may provide training as appropriate and as negotiated in the MOU. (See § 641.540 for a further discussion of training for SCSEP participants.)

## Subpart C—The State Plan

### § 641.300 What is the State Plan?

The State Plan is a plan, submitted by the Governor, or the highest government official, in each State, as an independent document or as part of the WIA Unified Plan, that outlines a four-year strategy for the statewide provision of community service employment and other authorized activities for eligible individuals under the SCSEP as

described in § 641.302. The State Plan also describes the planning and implementation process for SCSEP services in the State, taking into account the relative distribution of eligible individuals and employment opportunities within the State. The State Plan is intended to foster coordination among the various SCSEP grantees/sub-recipients operating within the State and to facilitate the efforts of stakeholders, including State and Local Boards under WIA, to work collaboratively through a participatory process to accomplish the SCSEP's goals. (OAA sec. 503(a)(1)). The State Plan provisions are listed in § 641.325.

**§ 641.302 What is a four-year strategy?**

The State Plan must outline a four-year strategy for the statewide provision of community service employment and other authorized activities for eligible individuals under the SCSEP program. (OAA sec. 503(a)(1)). The four-year strategy must specifically address the following:

(a) The State's long-term strategy for achieving an equitable distribution of SCSEP positions within the State that:

(1) Moves positions from over-served to underserved locations within the State, pursuant to § 641.365;

(2) Equitably serves rural and urban areas; and

(3) Serves individuals afforded priority for service, pursuant to § 641.520;

(b) The State's long-term strategy for avoiding disruptions to the program when new Census data become available, or when there is over-enrollment for any other reason;

(c) The State's long-term strategy for serving minority older individuals under SCSEP;

(d) Long-term projections for job growth in industries and occupations in the State that may provide employment opportunities for older workers, and how those relate to the types of unsubsidized jobs for which SCSEP participants will be trained, and the types of skill training to be provided;

(e) The State's long-term strategy for engaging employers to develop and promote opportunities for the placement of SCSEP participants in unsubsidized employment;

(f) The State strategy for continuous increase in the level of performance for entry into unsubsidized employment, and to achieve, at a minimum, the levels specified in section 513(a)(2)(E)(ii) of the OAA;

(g) Planned actions to coordinate activities of SCSEP grantees with the activities being carried out in the State under title I of WIA, including plans for utilizing the WIA One-Stop Delivery System and its partners to serve individuals aged 55 and older;

(h) Planned actions to coordinate activities of SCSEP grantees with the activities being carried out in the State under other titles of the OAA;

(i) Planned actions to coordinate the SCSEP with other public and private entities and programs that provide services to older Americans, such as community and faith-based organizations, transportation programs, and programs for those with special needs or disabilities;

(j) Planned actions to coordinate the SCSEP with other labor market and job training initiatives; and

(k) The State's long-term strategy to improve SCSEP services, including planned longer-term changes to the design of the program within the State, and planned changes in the utilization of SCSEP grantees and program operators so as to better achieve the goals of the program; this may include recommendations to the Department, as appropriate.

**§ 641.305 Who is responsible for developing and submitting the State Plan?**

The Governor, or the highest governmental official, of each State is responsible for developing and submitting the State Plan to the Department.

**§ 641.310 May the Governor, or the highest government official, delegate responsibility for developing and submitting the State Plan?**

Yes, the Governor, or the highest governmental official of each State, may delegate responsibility for developing and submitting the State Plan, provided that any such delegation is consistent with State law and regulations. To delegate responsibility, the Governor, or the highest government official, must submit to the Department a signed statement indicating the individual and/or organization that will be submitting the State Plan on his or her behalf.

**§ 641.315 Who participates in developing the State Plan?**

(a) In developing the State Plan the Governor, or the highest government official, must seek the advice and recommendations of representatives from:

(1) The State and Area Agencies on Aging;

(2) State and Local Boards under the Workforce Investment Act (WIA);

(3) Public and private nonprofit agencies and organizations providing employment services, including each grantee operating a SCSEP project within the State, except as provided for in § 641.320(b);

(4) Social service organizations providing services to older individuals;

(5) Grantees under title III of the OAA;

(6) Affected communities;

(7) Unemployed older individuals;

(8) Community-based organizations serving older individuals;

(9) Business organizations; and

(10) Labor organizations.

(b) The Governor, or the highest government official, may also obtain the advice and recommendations of other interested organizations and individuals, including SCSEP program participants, in developing the State Plan. (OAA sec. 503(a)(2)).

**§ 641.320 Must all national grantees operating within a State participate in the State planning process?**

(a) The eligibility provision at OAA section 514(c)(6) requires national grantees to coordinate activities with other organizations at the State and local levels. Therefore, except as provided in paragraph (b) of this section, any national grantee that does not participate in the State planning process may be deemed ineligible to receive SCSEP funds in the following Program Year.

(b) National grantees serving older American Indians, or Pacific Island and Asian Americans, with funds reserved under OAA section 506(a)(3), are exempted from the requirement to participate in the State planning processes under section 503(a)(8) of the OAA. Although these national grantees may choose not to participate in the State planning process, the Department encourages their participation. Only those grantees using reserved funds are exempt; if a grantee is awarded one grant with reserved funds and another grant with non-reserved funds, the grantee is required under paragraph (a) of this section to participate in the State planning process for purposes of the non-reserved funds grant.

**§ 641.325 What information must be provided in the State Plan?**

The Department issues instructions detailing the information that must be provided in the State Plan. At a minimum, the State Plan must include the State's four-year strategy, as described in § 641.302, and information on the following:

(a) The ratio of eligible individuals in each service area to the total eligible population in the State;

(b) The relative distribution of:

(1) Eligible individuals residing in urban and rural areas within the State;

(2) Eligible individuals who have the greatest economic need;

(3) Eligible individuals who are minorities;

(4) Eligible individuals who are limited English proficient; and

(5) Eligible individuals who have the greatest social need;

(c) The current and projected employment opportunities in the State (such as by providing information available under section 15 of the Wagner-Peyser Act (29 U.S.C. 491–2) by occupation), and the types of skills possessed by eligible individuals;

(d) The localities and populations for which projects of the type authorized by title V are most needed;

(e) Actions taken and/or planned to coordinate activities of SCSEP grantees in the State with activities carried out in the State under title I of WIA;

(f) A description of the process used to obtain advice and recommendations on the State Plan from representatives of organizations and individuals listed in § 641.315, and advice and recommendations on steps to coordinate SCSEP services with activities funded under title I of WIA from representatives of organizations listed in § 641.335;

(g) A description of the State's procedures and time line for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment as required by § 641.350;

(h) Public comments received, and a summary of the comments;

(i) A description of the steps taken to avoid disruptions to the greatest extent possible as provided in § 641.365; and

(j) Such other information as the Department may require in the State Plan instructions. (OAA sec. 503(a)(3)–(4), (6)).

**§ 641.330 How should the State Plan reflect community service needs?**

The Governor, or the highest government official, must ensure that the State Plan identifies the types of community services that are needed and the places where these services are most needed. The State Plan should specifically identify the needs and locations of those individuals most in need of community services and the groups working to meet their needs. (OAA section 503(a)(4)(E)).

**§ 641.335 How should the Governor, or the highest government official, address the coordination of SCSEP services with activities funded under title I of WIA?**

The Governor, or the highest government official, must seek the advice and recommendations from representatives of the State and Area Agencies on Aging in the State and the State and Local Boards established under title I of WIA. (OAA sec. 503(a)(2)). The State Plan must describe the steps that are being taken to coordinate SCSEP activities within the State with activities being carried out under title I of WIA. (OAA sec. 503(a)(4)(F)). The State Plan must describe the steps being taken to ensure that the SCSEP is an active partner in each One-Stop Delivery System and the steps that will be taken to encourage and improve coordination with the One-Stop Delivery System.

**§ 641.340 How often must the Governor, or the highest government official, update the State Plan?**

Pursuant to instructions issued by the Department, the Governor, or the highest government official, must review the State Plan and submit an update to the State Plan to the Secretary for consideration and approval not less often than every two years. OAA section 503(a)(1). States are encouraged to review their State Plan more frequently than every two years, however, and make modifications as circumstances warrant, pursuant to § 641.345. Prior to development of the update to the State Plan, the Governor, or the highest government official, must seek the advice and recommendations of the individuals and organizations identified in § 641.315 about what, if any, changes are needed, and must publish the State Plan, showing the changes, for public comment. OAA sections 503(a)(2), 503(a)(3).

**§ 641.345 What are the requirements for modifying the State Plan?**

(a) Modifications may be submitted anytime circumstances warrant.

(b) Modifications to the State Plan are required when:

(1) There are changes in Federal or State law or policy that substantially change the assumptions upon which the State Plan is based;

(2) There are significant changes in the State's vision, four-year strategy, policies, performance indicators, or organizational responsibilities;

(3) The State has failed to meet performance goals and must submit a corrective action plan; or

(4) There is a change in a grantee or grantees.

(c) Modifications to the State Plan are subject to the same public review and comment requirements that apply to the development of the State Plan under § 641.350.

(d) States are not required to seek the advice and recommendations of the individuals and organizations identified in § 641.315 when modifying the State Plan.

(e) The Department will issue additional instructions for the procedures that must be followed when requesting modifications to the State Plan. (OAA sec. 503(a)(1)).

**§ 641.350 How should public comments be solicited and collected?**

The Governor, or the highest government official, should follow established State procedures to solicit and collect public comments. The State Plan must include a description of the State's procedures and schedule for ensuring an open and inclusive planning process that provides meaningful opportunity for public comment.

**§ 641.355 Who may comment on the State Plan?**

Any individual or organization may comment on the Plan.

**§ 641.360 How does the State Plan relate to the equitable distribution report?**

The two documents address some of the same areas, but are prepared at different points in time. The equitable distribution report is prepared by State grantees at the beginning of each fiscal year and provides a ''snapshot'' of the actual distribution of all of the authorized positions within the State, grantee-by-grantee, and the optimum number of participant positions in each designated area based on the latest available Census data. The State Plan is prepared by the Governor, or the highest government official, and covers many areas in addition to equitable distribution, as discussed in § 641.325, and sets forth a proposed plan for distribution of authorized positions in the State. Any distribution or redistribution of positions made as a result of a State Plan proposal will be reflected in the next equitable distribution report, which then forms the basis for the proposed distribution in the next State Plan update. This process is iterative in that it moves the authorized positions from over-served areas to underserved areas over a period of time.

**§ 641.365 How must the equitable distribution provisions be reconciled with the provision that disruptions to current participants should be avoided?**

Governors, or highest government officials, must describe in the State Plan the steps that are being taken to comply with the statutory requirement to avoid disruptions in the provision of services for participants. (OAA sec. 503(a)(6)). When there are new Census data indicating that there has been a shift in the location of the eligible population or when there is over-enrollment for any

other reason, the Department recommends a gradual shift that encourages current participants in subsidized community service employment assignments to move into unsubsidized employment to make positions available for eligible individuals in the areas where there has been an increase in the eligible population. The Department does not define disruptions to mean that participants are entitled to remain in a subsidized community service employment assignment indefinitely. As discussed in § 641.570, there is a time limit on SCSEP participation, thus permitting positions to be transferred over time. Grantees and sub-recipients must not transfer positions from one geographic area to another without first notifying the State agency responsible for preparing the State Plan and equitable distribution report. Grantees must submit, in writing, any proposed changes in distribution that occur after submission of the equitable distribution report to the Federal Project Officer for approval. All grantees are strongly encouraged to coordinate any proposed changes in position distribution with the other grantees in the State, including the State project director, prior to submitting the proposed changes to their Federal Project Officer for approval.

## Subpart D—Grant Application and Responsibility Review Requirements for State and National SCSEP Grants

### § 641.400 What entities are eligible to apply to the Department for funds to administer SCSEP projects?

(a) *National Grants.* Entities eligible to apply for national grants include nonprofit organizations, Federal public agencies, and tribal organizations. These entities must be capable of administering a multi-State program. State and local agencies may not apply for these funds.

(b) *State Grants.* (1) Section 506(e) of the OAA requires the Department to award each State a grant to provide SCSEP services. Governors, or highest government officials, designate an individual State agency as the organization to administer SCSEP funds.

(2) If the State fails to meet its expected levels of performance for the core indicators for three consecutive years, it is not eligible to designate an agency to administer SCSEP funds in the following year. Instead, the State must conduct a competition to select an organization as the grantee of the funds allotted to the State under section 506(e). Public and nonprofit private agencies and organizations, State agencies other than the previously designated, failed agency, and tribal organizations, are eligible to be selected as a grantee for the funds. Other States may not be selected as a grantee for this funding.

### § 641.410 How does an eligible entity apply?

(a) *General.* An eligible entity must follow the application guidelines issued by the Department. The Department will issue application guidelines announcing the availability of national funds and State funds, whether they are awarded on a competitive or noncompetitive basis. The guidelines will contain application due dates, application instructions, evaluation criteria, and other necessary information.

(b) *National Grant Applicants.* All applicants for SCSEP national grant funds, except organizations proposing to serve older Indians and Pacific Island and Asian Americans with funds reserved under OAA section 506(a)(3), must submit their applications to the Governor, or the highest government official, of each State in which projects are proposed so that he or she has a reasonable opportunity to make the recommendations described in § 641.480, before submitting the application to the Department. (OAA sec. 503(a)(5)).

(c) *State Applicants.* A State that submits a Unified Plan under WIA section 501 may include the State's SCSEP grant application in its Unified Plan. Any State that submits a SCSEP grant application as part of its WIA Unified Plan must address all of the application requirements as published in the Department's instructions. Sections 641.300 through 641.365 address State Plan applications and modifications.

### § 641.420 What are the eligibility criteria that each applicant must meet?

To be eligible to receive SCSEP funds, each applicant must be able to demonstrate:

(a) An ability to administer a program that serves the greatest number of eligible participants, giving particular consideration to individuals with greatest economic need, individuals with greatest social need, and individuals described in § 641.570(b) or § 641.520(a)(2) through (a)(8);

(b) An ability to administer a program that provides employment for eligible individuals in communities in which they reside, or in nearby communities, that will contribute to the general welfare of the community;

(c) An ability to administer a program that moves eligible participants into unsubsidized employment;

(d) Where the applicant has previously received a SCSEP grant, the applicant's prior performance in meeting SCSEP core measures of performance and addressing SCSEP additional measures of performance; and where the applicant has not received a SCSEP grant, the applicant's prior performance under other Federal or State programs;

(e) An ability to move participants with multiple barriers to employment, including individuals described in § 641.570(b) or § 641.520(a)(2) through (a)(8), into unsubsidized employment;

(f) An ability to coordinate activities with other organizations at the State and local levels, including the One-Stop Delivery System;

(g) An ability to properly manage the program, as reflected in its plan for fiscal management of the SCSEP;

(h) An ability to administer a project that provides community service;

(i) An ability to minimize program disruption for current participants and in community services provided if there is a change in project sponsor and/or location, and its plan for minimizing disruptions;

(j) Any additional criteria that the Department deems appropriate to minimize disruptions for current participants. (OAA sec. 514(c)).

### § 641.430 What are the responsibility conditions that an applicant must meet?

Subject to § 641.440, each applicant must meet each of the listed responsibility ''tests'' by not having committed any of the following acts:

(a) The Department has been unable to recover a debt from the applicant, whether incurred by the applicant or by one of its sub-recipients, or the applicant has failed to comply with a debt repayment plan to which it agreed. In this context, a debt is established by final agency action, followed by three demand letters to the applicant, without payment in full by the applicant.

(b) Established fraud or criminal activity of a significant nature within the applicant's organization.

(c) Serious administrative deficiencies identified by the Department, such as failure to maintain a financial management system as required by Federal regulations.

(d) Willful obstruction of the auditing or monitoring process.

(e) Failure to provide services to applicants as agreed to in a current or recent grant or to meet applicable core performance measures or address other applicable indicators of performance.

(f) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, or other activities.

(g) Failure to return a grant closeout package or outstanding advances within 90 days after the grant expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted.

(h) Failure to submit required reports.

(i) Failure to properly report and dispose of Government property as instructed by the Department.

(j) Failure to have maintained effective cash management or cost controls resulting in excess cash on hand.

(k) Failure to ensure that a sub-recipient complies with applicable audit requirements, including OMB Circular A–133 and the audit requirements specified at § 641.821.

(l) Failure to audit a sub-recipient within the period required under § 641.821.

(m) Final disallowed costs in excess of five percent of the grant or contract award if, in the judgment of the Grant Officer, the disallowances are egregious findings.

(n) Failure to establish a mechanism to resolve a sub-recipient's audit in a timely fashion. (OAA sec. 514(d)(4)).

**§ 641.440 Are there responsibility conditions that alone will disqualify an applicant?**

(a) Yes, an applicant may be disqualified if

(1) Either of the first two responsibility tests listed in § 641.430 is not met, or

(2) The applicant substantially, or persistently for two or more consecutive years, fails one of the other responsibility tests listed in § 641.430.

(b) The second responsibility test addresses ''fraud or criminal activity of a significant nature.'' The Department will determine the existence of significant fraud or criminal activity which typically will include willful or grossly negligent disregard for the use or handling of, or other fiduciary duties concerning, Federal funding, where the grantee has no effective systems, checks, or safeguards to detect or prevent fraud or criminal activity. Additionally, significant fraud or criminal activity will typically include coordinated patterns or behaviors that pervade a grantee's administration or are focused at the higher levels of a grantee's management or authority. The Department will determine whether ''fraud or criminal activity of a significant nature'' has occurred on a case-by-case basis, regardless of what party identifies the alleged fraud or criminal activity.

**§ 641.450 How will the Department examine the responsibility of eligible entities?**

The Department will review available records to assess each applicant's overall fiscal and administrative ability to manage Federal funds. The Department's responsibility review may consider any available information, including the organization's history with regard to the management of other grants awarded by the Department or by other Federal agencies. (OAA sec. 514(d)(1) and(d)(2)).

**§ 641.460 What factors will the Department consider in selecting national grantees?**

The Department will select national grantees from among applicants that are able to meet the eligibility and responsibility review criteria at section 514 of the OAA. (Section 641.420 contains the eligibility criteria and § 641.430 and § 641.440 contain the responsibility criteria.) The Department also will take the rating criteria described in the Solicitation for Grant Application or other instrument into consideration.

**§ 641.465 Under what circumstances may the Department reject an application?**

(a) The Department may question any proposed project component of an application if it believes that the component will not serve the purposes of the SCSEP. The Department may reject the application if the applicant does not submit or negotiate an acceptable alternative.

(b) The Department may reject any application that the Grant Officer determines unacceptable based on the content of the application, rating score, past performance, fiscal management, or any other factor the Grant Officer believes serves the best interest of the program, including the application's comparative rating in a competition.

**§ 641.470 What happens if an applicant's application is rejected?**

(a) Any entity whose application is rejected in whole or in part will be informed that they have not been selected. The non-selected entity may request an explanation of the Department's basis for its rejection. If requested, the Department will provide the entity with feedback on its proposal. See § 641.900.

(b) Incumbent grantees will not have an opportunity to obtain technical assistance provided by the Department under OAA section 513(d)(2)(B)(i) to cure in an open competition any deficiency in a proposal because that will create inequity in favor of incumbents.

(c) If the Administrative Law Judge (ALJ) rules, under § 641.900, that the organization should have been selected, in whole or in part, the matter must be remanded to the Grant Officer. The Grant Officer must, within 10 working days, determine whether the organization continues to meet the requirements of this part, and whether the positions which are the subject of the ALJ's decision will be awarded, in whole or in part, to the organization and the timing of the award. In making this determination, the Grant Officer must take into account disruption to participants, disruption to grantees, and the operational needs of the SCSEP.

(d) In the event that the Grant Officer determines that it is not feasible to award any positions to the appealing applicant, the applicant will be awarded its bid preparation costs, or a pro rata share of those costs if the Grant Officer's finding applies to only a portion of the funds that would be awarded. If positions are awarded to the appealing applicant, that applicant is not entitled to the full grant amount but will only receive the funds remaining in the grant that have not been expended by the current grantee through its operation of the grant and its subsequent closeout. The available remedy in a SCSEP non-selection appeal is neither retroactive nor an immediately effective selection; rather it is the potential to be selected as a SCSEP grantee as quickly as administratively feasible in the future, for the remainder of the grant cycle.

(e) In the event that any party notifies the Grant Officer that it is not satisfied with the Grant Officer's decision, the Grant Officer must return the decision to the ALJ for review.

(f) Any organization selected and/or funded as a SCSEP grantee is subject to having its positions reduced or to being removed as a SCSEP grantee if an ALJ decision so orders. The Grant Officer provides instructions on transition and closeout to both the newly designated grantee and to the grantee whose positions are affected or which is being removed. All parties must agree to the provisions of this paragraph as a condition of being a SCSEP grantee.

**§ 641.480 May the Governor, or the highest government official, make recommendations to the Department on national grant applications?**

(a) Yes, in accordance with § 641.410(b), each Governor, or highest government official, will have a reasonable opportunity to make comments on any application to operate

a SCSEP project located in the Governor's, or the highest government official's, State before the Department makes a final decision on a grant award. The Governor's, or the highest government official's, comments should be directed to the Department and may include the anticipated effect of the proposal on the overall distribution of program positions within the State; recommendations for redistribution of positions to underserved areas as vacancies occur in previously encumbered positions in other areas; and recommendations for distributing any new positions that may become available as a result of an increase in funding for the State. The Governor's, or the highest government official's, recommendations should be consistent with the State Plan. (OAA sec. 503(a)(5)).

(b) The Governor, or the highest government official, has the option of making the authorized recommendations on all applications or only on those applications proposed for award following the rating process. It is incumbent on each Governor, or the highest government official, to inform the Department of his or her intent to review the applications before or after the rating process.

**§ 641.490 When will the Department compete SCSEP grant awards?**

(a)(1) As provided in a Solicitation for Grant Applications published in the **Federal Register**, the Department will hold a full and open competition for national grants every four years. (OAA sec. 514(a)(1)).

(2) If a national grantee meets the expected level of performance for each of the core indicators for each of the four years, the Department may provide an additional one-year grant to the national grantee. (OAA sec. 514(a)(2)).

**§ 641.495 When must a State compete its SCSEP award?**

If a State grantee fails to meet its expected levels of performance for three consecutive Program Years, the State must hold a full and open competition, under such conditions as the Secretary may provide, for the State SCSEP funds for the full Program Year following the determination of consecutive failure. (OAA sec. 513(d)(3)(B)(iii)). The incumbent (failed) grantee is not eligible to compete. Other states are also not eligible to compete for these funds. (See § 641.400(b)(2))

## Subpart E—Services to Participants

**§ 641.500 Who is eligible to participate in the SCSEP?**

Anyone who is at least 55 years old, unemployed (as defined in § 641.140), and who is a member of a family with an income that is not more than 125 percent of the family income levels prepared by the Department of Health and Human Services and approved by OMB (Federal poverty guidelines) is eligible to participate in the SCSEP. (OAA sec. 518(a)(3), (8)). A person with a disability may be treated as a ''family of one'' for income eligibility determination purposes.

**§ 641.505 When is eligibility determined?**

Initial eligibility is determined at the time individuals apply to participate in the SCSEP. Once individuals become SCSEP participants, the grantee/sub-recipient is responsible for verifying their continued eligibility at least once every 12 months. Grantees/sub-recipients may also verify an individual's eligibility as circumstances require, including instances when enrollment is delayed.

**§ 641.507 How is applicant income computed?**

An applicant's income is computed by calculating the includable income received by the applicant during the 12-month period ending on the date an individual submits an application to participate in the SCSEP, or the annualized income for the 6-month period ending on the application date, whichever the grantee involved selects. (OAA sec. 518(a)(4)).

**§ 641.510 What types of income are included and excluded for participant eligibility determinations?**

(a) With certain exceptions, the Department will use the definition of income from the U.S. Census Bureau's Current Population Survey (CPS) as the standard for determining SCSEP applicant income eligibility.

(b) Any income that is unemployment compensation, a benefit received under title XVI of the Social Security Act (42 U.S.C. 1381 *et seq.*), a payment made to or on behalf of veterans or former members of the Armed Forces under the laws administered by the Secretary of Veterans Affairs, or 25 percent of a benefit received under title II of the Social Security Act (42 U.S.C. 401 *et seq.*), must be excluded from SCSEP income eligibility determinations. (OAA sec. 518(a)(3)(A)).

(c) The Department has issued administrative guidance on income inclusions and exclusions and procedures for determining SCSEP income eligibility. This guidance may be updated periodically.

**§ 641.512 May grantees/sub-recipients enroll otherwise eligible individuals and place them directly into unsubsidized employment?**

No, grantees/sub-recipients may not enroll as SCSEP participants individuals who can be directly placed into unsubsidized employment. Such individuals should be referred to an employment provider, such as the One-Stop Center for job placement assistance under WIA.

**§ 641.515 How must grantees/sub-recipients recruit and select eligible individuals for participation in the SCSEP?**

(a) Grantees and sub-recipients must develop methods of recruitment and selection that assure that the maximum number of eligible individuals have an opportunity to participate in the program. To the extent feasible, grantees and sub-recipients should seek to enroll minority and Indian eligible individuals, eligible individuals with limited English proficiency, and eligible individuals with greatest economic need, at least in proportion to their numbers in the area, taking into consideration their rates of poverty and unemployment. (OAA sec. 502(b)(1)(M)).

(b) Grantees and sub-recipients must use the One-Stop Delivery System in the recruitment and selection of eligible individuals to ensure that the maximum number of eligible individuals have an opportunity to participate in the project. (OAA sec. 502(b)(1)(H)).

(c) States may enter into agreements among themselves to permit cross-border enrollment of eligible participants. Such agreements should cover both State and national grantee positions and must be submitted to the Department for approval.

**§ 641.520 Are there any priorities that grantees/sub-recipients must use in selecting eligible individuals for participation in the SCSEP?**

(a) Yes, in selecting eligible individuals for participation in the SCSEP, priority must be given to individuals who have one or more of the following characteristics:

(1) Are 65 years of age or older;

(2) Have a disability;

(3) Have limited English proficiency or low literacy skills;

(4) Reside in a rural area;

(5) Are veterans (or, in some cases, spouses of veterans) for purposes of section 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a) as set forth in paragraph (b) of this section;

(6) Have low employment prospects;

(7) Have failed to find employment after utilizing services provided through the One-Stop Delivery System; or

(8) Are homeless or are at risk for homelessness.(OAA sec. 518(b)).

(b) Section 2(a) of the Jobs for Veterans Act creates a priority for service for veterans (and, in some cases, spouses of veterans) who otherwise meet the program eligibility criteria for the SCSEP. 38 U.S.C. 4215(a). Priority is extended to veterans. Priority is also extended to the spouse of a veteran who died of a service-connected disability; the spouse of a member of the Armed Forces on active duty who has been listed for a total of more than 90 days as missing in action, captured in the line of duty by a hostile force, or forcibly detained by a foreign government or power; the spouse of any veteran who has a total disability resulting from a service-connected disability; and the spouse of any veteran who died while a disability so evaluated was in existence.

(c) Grantees/sub-recipients must apply these priorities in the following order:

(1) Persons who qualify as a veteran or qualified spouse under section 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a), and who possess at least one of the other priority characteristics;

(2) Persons who qualify as a veteran or qualified spouse under section 2(a) of the Jobs for Veterans Act, 38 U.S.C. 4215(a), who do not possess any other of the priority characteristics;

(3) Persons who do not qualify as a veteran or qualified spouse under section 2(a) of the Jobs for Veterans Act (non-veterans), and who possess at least one of the other priority characteristics.

**§ 641.535 What services must grantees/sub-recipients provide to participants?**

(a) When individuals are selected for participation in the SCSEP, the grantee/sub-recipient is responsible for:

(1) Providing orientation to the SCSEP, including information on project goals and objectives, community service employment assignments, training opportunities, available supportive services, the availability of a free physical examination, participant rights and responsibilities, and permitted and prohibited political activities (OAA sec. 502);

(2)(i) Assessing participants' work history, skills and interests, talents, physical capabilities, aptitudes, needs for supportive services, occupational preferences, training needs, potential for performing community service employment assignments, and potential for transition to unsubsidized employment;

(ii) Performing an initial assessment upon program entry, unless an assessment has already been performed under title I of WIA as provided in § 641.230. Subsequent assessments may be made as necessary, but must be made no less frequently than two times during a twelve month period (including the initial assessment);

(3)(i) Using the information gathered during the initial assessment to develop an IEP that includes an appropriate employment goal for each participant, except that if an assessment has already been performed and an IEP developed under title I of WIA, the WIA assessment and IEP will satisfy the requirement for a SCSEP assessment and IEP as provided in § 641.230;

(ii) Updating the IEP as necessary to reflect information gathered during the subsequent participant assessments (OAA sec. 502(b)(1)(N));

(4) Placing participants in appropriate community service employment assignments in the community in which they reside, or in a nearby community (OAA sec. 502(b)(1)(B));

(5) Providing or arranging for training identified in participants' IEPs and consistent with the SCSEP's goal of unsubsidized employment (OAA secs. 502(a)(1), 502(b)(1)(B), 502(b)(1)(I), 502(b)(1)(N)(ii));

(6) Assisting participants in arranging for needed supportive services identified in their SCSEP IEPs (OAA sec. 502(b)(1)(N));

(7) Providing appropriate services for participants, or referring participants to appropriate services, through the One-Stop Delivery System established under WIA (OAA sec. 502(b)(1)(O));

(8) Providing counseling on participants' progress in meeting the goals and objectives identified in their IEPs, and in meeting their supportive service needs (OAA sec. 502(b)(1)(N)(iii));

(9) Providing participants with wages and benefits for time spent in the community service employment assignment, orientation, and training (OAA secs. 502(b)(1)(I), 502(b)(1)(J), 502(c)(6)(A)(i)) (see also §§ 641.565 and 641.540(f), addressing wages and benefits);

(10) Ensuring that participants have safe and healthy working conditions at their community service employment worksites (OAA sec. 502(b)(1)(J));

(11) Assisting participants in obtaining unsubsidized employment, including providing or arranging for employment counseling in support of their IEPs;

(b) In addition to the services listed in paragraph (a) of this section, grantees/sub-recipients must provide services to participants according to administrative guidelines that may be issued by the Department.

(c) Grantees may not use SCSEP funds for individuals who only need job search assistance or job referral services. Grantees may provide job search assistance and job club activities to participants who are enrolled in the SCSEP and are assigned to community service employment assignments. (See also § 641.512).

**§ 641.540 What types of training may grantees/sub-recipients provide to SCSEP participants in addition to the training received at the community service employment assignment?**

(a) In addition to the training provided in a community service employment assignment, grantees and sub-recipients must arrange skill training that is realistic and consistent with the participants' IEP, that makes the most effective use of their skills and talents, and that prepares them for unsubsidized employment.

(b) Training may be provided prior to beginning or concurrent with a community service employment assignment.

(c) Training may be in the form of lectures, seminars, classroom instruction, individual instruction, online instruction, on-the-job experiences, or other arrangements, including but not limited to, arrangements with other workforce development programs such as WIA. (OAA sec. 502(c)(6)(A)(ii)).

(d) Grantees/sub-recipients are encouraged to obtain training through locally available resources, including host agencies, at no cost or reduced cost to the SCSEP.

(e) Grantees/sub-recipients may pay for participant training, including the payment of reasonable costs of instructors, classroom rental, training supplies, materials, equipment, and tuition. (OAA sec. 502(c)(6)(A)(ii)).

(f) Participants must be paid wages while in training, as described in § 641.565(a). (OAA sec. 502(b)(1)(I)).

(g) Grantees/sub-recipients may pay for costs associated with supportive services, such as transportation, necessary to participate in training. (OAA sec. 502(b)(1)(L)).

(h) Nothing in this section prevents or limits participants from engaging in self-development training available through other sources, at their own expense, during hours when not performing their community service employment assignments.

**§ 641.545 What supportive services may grantees/sub-recipients provide to participants?**

(a) Grantees/sub-recipients may provide or arrange for supportive services that are necessary to enable an individual to successfully participate in a SCSEP project, including but not limited to payment of reasonable costs of transportation; health and medical services; special job-related or personal counseling; incidentals such as work shoes, badges, uniforms, eyeglasses, and tools; dependent care; housing; needs-related payments; and follow-up services. (OAA secs. 502(c)(6)(A)(iv), 518(a)(7)).

(b) To the extent practicable, the grantee/sub-recipient should provide for the payment of these expenses from other resources.

(c) Grantees/sub-recipients are encouraged to contact placed participants throughout the first 12 months following placement to determine if they have the necessary supportive services to remain in the job.

**§ 641.550 What responsibility do grantees/sub-recipients have to place participants in unsubsidized employment?**

Because one goal of the program is to foster economic self-sufficiency, and because the SCSEP limits the amount of time a participant can remain in the program, grantees and sub-recipients must make every effort to place participants in unsubsidized employment. Grantees/sub-recipients are responsible for working with participants to ensure that the participants are receiving services and taking actions designed to help them achieve this goal. Grantees/sub-recipients must contact private and public employers directly or through the One-Stop Delivery System to develop or identify suitable unsubsidized employment opportunities. They must also encourage host agencies to assist participants in their transition to unsubsidized employment, including unsubsidized employment with the host agency.

**§ 641.565 What policies govern the provision of wages and benefits to participants?**

(a) *Wages.* (1)(i) Grantees/sub-recipients must pay participants the highest applicable required wage for time spent in orientation, training, and community service employment assignments.

(ii) SCSEP participants may be paid the highest applicable required wage while receiving intensive services.

(2) The highest applicable required wage is either the minimum wage applicable under the Fair Labor Standards Act of 1938; the State or local minimum wage for the most nearly comparable covered employment; or the prevailing rate of pay for persons employed in similar public occupations by the same employer.

(3) Grantees/sub-recipients must make any adjustments to minimum wage rates payable to participants as may be required by Federal, State, or local statute during the grant term.

(b) *Benefits.* (1) *Required benefits.* Except as provided in paragraph (b)(2) of this section, grantees/sub-recipients must ensure that participants receive such benefits as are required by law.

(i) Grantees/sub-recipients must provide benefits uniformly to all participants within a project or subproject, unless the Department agrees to waive this provision due to a determination that such a waiver is in the best interests of applicants, participants, and project administration.

(ii) Grantees/sub-recipients must offer participants the opportunity to receive physical examinations annually.

(A) Physical examinations are a benefit, and not an eligibility criterion. The examining physician must provide, to participants only, a written report of the results of the examination. Participants may, at their option, provide the grantee or sub-recipient with a copy of the report.

(B) Participants may choose not to accept the physical examination. In that case, the grantee or sub-recipient must document this refusal, through a signed statement or other means, within 60 workdays after commencement of the community service employment assignment. Each year thereafter, grantees and sub-recipients must offer the physical examination and document the offer and any participant's refusal.

(C) Grantees/sub-recipients may use SCSEP funds to pay the costs of physical examinations.

(iii) When participants are not covered by the State workers' compensation law, the grantee or sub-recipient must provide participants with workers' compensation benefits equal to those provided by law for covered employment. OAA section 504(b).

(iv) If required by State law, grantees/sub-recipients must provide unemployment compensation coverage for participants.

(v) Grantees/sub-recipients must provide compensation for scheduled work hours during which a host agency's business is closed for a Federal holiday.

(vi) Grantees/sub-recipients must provide necessary sick leave, whether paid or unpaid, that is not part of an accumulated sick leave program.

(2) *Prohibited wage and benefits costs.*

(i) Participants may not carry over allowable benefits (including sick leave) from one Program Year to the next;

(ii) Grantees/sub-recipients may not provide payment or otherwise compensate participants for unused benefits such as sick leave or holidays;

(iii) Grantees/sub-recipients may not use SCSEP funds to cover costs associated with the following participant benefits:

(A) Retirement. Grantees/sub-recipients may not use SCSEP funds to provide contributions into a retirement system or plan, or to pay the cost of pension benefits for program participants.

(B) Annual leave.

(C) Accumulated sick leave.

(D) Bonuses.

(OAA sec. 502(c)(6)(A)(i)).

**§ 641.570 Is there a time limit for participation in the program?**

(a) *Individual Time Limit.* (1) Eligible individuals may participate in the program for a maximum duration of 48 months in the aggregate (whether or not consecutive), from the later of July 1, 2007, or the date of the individual's enrollment in the program.

(2) At the time of enrollment, the grantee/sub-recipient must inform the participant of the time limit and the possible extension, and the grantee/sub-recipient must provide for a system to transition participants to unsubsidized employment or other assistance before the maximum enrollment duration has expired. Provisions for transition must be reflected in the participant's IEP.

(3) Pursuant to a request from a grantee/sub-recipient, the Department will authorize an extension for individuals who meet the criteria in paragraph (b) of this section. Notwithstanding any individual extensions granted, grantees/sub-recipients must ensure that projects do not exceed the overall average participation cap for all participants, as described in paragraph (c) of this section.

(b) *Increased periods of individual participation.* Pursuant to a request by a grantee, the Department will authorize a one-time increased period of participation up to an additional 12 months for individuals who:

(1) Have a severe disability;

(2) Are frail or are age 75 or older;

(3) Meet the eligibility requirements related to age for, but do not receive, benefits under title II of the Social Security Act (42 U.S.C. 401 *et seq.*);

(4) Live in an area with persistent unemployment and are individuals with severely limited employment prospects; or

(5) Have limited English proficiency or low literacy skills.

(c) *Average participation cap.* (1) Notwithstanding any individual extension authorized pursuant to paragraph (b) of this section, each grantee must manage its SCSEP project in such a way that the grantee does not exceed an average participation cap for all participants of 27 months (in the aggregate).

(2) A grantee may request, and the Department may authorize, an extended average participation period of up to 36 months (in the aggregate) for a particular project area in a given Program Year if the Department determines that extenuating circumstances exist to justify an extension, due to one more of the following factors:

(i) High rates of unemployment or of poverty or participation in the program of block grants to States for temporary assistance for needy families established under part A of title IV of the Social Security Act, in the areas served by a grantee, relative to other areas of the State involved or Nation;

(ii) Significant downturns in the areas served by the grantee or in the national economy;

(iii) Significant numbers or proportions of participants with one or more barriers to employment, including ''most-in-need'' individuals described in § 641.710(a)(6), served by a grantee relative to such numbers or proportions for grantees serving other areas of the State or Nation;

(iv) Changes in Federal, State, or local minimum wage requirements; or

(v) Limited economies of scale for the provision of community service employment and other authorized activities in the areas served by the grantee.

(3) For purposes of the average participation cap, each grant will be considered to be one project.

(d) *Authorized break in participation.* On occasion a participant takes an authorized break in participation from the program, such as a formal leave of absence necessitated by personal circumstances or a break caused because a suitable community service employment assignment is not available. Such an authorized break, if taken pursuant to a formal grantee policy allowing such breaks and formally entered into the SCSEP Performance and Results Quarterly Performance Reporting (SPARQ) system, will not count toward the individual time limit described in paragraph (a) or the average participation cap described in paragraph (c).

(e) *Administrative guidance.* The Department will issue administrative guidance detailing the process by which a grantee may request an increased period of participation for a participant(s), and the process by which a grantee may request an extension of the average participation cap.

(f) *Grantee authority.* Grantees may limit the time of participation for individuals to less than the 48 months described in paragraph (a) of this section, if the grantee uniformly applies the lower participation limit, and if the grantee submits a description of the lower participation limit policy in its grant application. (OAA secs. 502(b)(1)(C), 518(a)(3)(B)).

### § 641.575 May a grantee/sub-recipient establish a limit on the amount of time its participants may spend at each host agency?

Yes, grantees/sub-recipients may establish limits on the amount of time that participants spend at a particular host agency, and are encouraged to rotate participants among different host agencies, or to different assignments within the same host agency, as such rotations may increase participants' skills development and employment opportunities. Such limits are established in the grant agreement, as approved by the Department, and must be consistent with the participants' IEPs. Host agency rotations have no effect on either the individual participation limit or the average participation cap (see § 641.570).

### § 641.577 Is there a limit on community service employment assignment hours?

Yes. Each participant's community service employment assignment must not exceed 1,300 hours during a Program Year. The 1,300 hours includes all paid hours directly related to the community service employment assignment, including any hours of scheduled work during a Federal holiday and any hours of compensated or uncompensated leave. Hours spent by a participant in SCSEP orientation and training do not count toward the 1,300 hour limit.

### § 641.580 Under what circumstances may a grantee/sub-recipient terminate a participant?

(a) If, at any time, a grantee or sub-recipient determines that a participant was incorrectly declared eligible as a result of false information knowingly given by that individual, the grantee/sub-recipient must give the participant immediate written notice explaining the reason(s) for termination and immediately terminate the participant.

(b) If, during eligibility verification under § 641.505, a grantee/sub-recipient finds a participant to be no longer eligible for enrollment, the grantee/sub-recipient must give the participant written notice explaining the reason(s) for termination within 30 days, and must terminate the participant 30 days after the participant receives the notice.

(c) If, at any time, the grantee/sub-recipient determines that it incorrectly determined a participant to be eligible for the program through no fault of the participant, the grantee/sub-recipient must give the participant immediate written notice explaining the reason(s) for termination and must terminate the participant 30 days after the participant receives the notice.

(d) A grantee/sub-recipient may terminate a participant for cause. In doing so, the grantee/sub-recipient must give the participant written notice explaining the reason(s) for termination. Grantees must include their policies concerning for-cause terminations in the grant application.

(e) A grantee/sub-recipient may terminate a participant if the participant refuses to accept a reasonable number of job offers or referrals to unsubsidized employment consistent with the SCSEP IEP and there are no extenuating circumstances that would hinder the participant from moving to unsubsidized employment. The grantee/sub-recipient must give the participant written notice explaining the reason(s) for termination and must terminate the participant 30 days after the participant receives the notice.

(f) When a grantee/sub-recipient makes an unfavorable determination of enrollment eligibility under paragraphs (b) and (c) of this section, it should refer the individual to other potential sources of assistance, such as the One-Stop Delivery System. When a grantee/sub-recipient terminates a participant under paragraphs (d) and (e) of this section, it may refer the individual to other potential sources of assistance, such as the One-Stop Delivery System.

(g) Grantees and sub-recipients must provide each participant at the time of enrollment with a written copy of its policies for terminating a participant for cause or otherwise, and must verbally review those policies with each participant.

(h) Any termination, as described in paragraphs (a) through (e) of this section, must be consistent with administrative guidelines issued by the Department, and the termination must be subject to the applicable grievance procedures described in § 641.910.

(i) Participants may not be terminated from the program solely on the basis of their age. Grantees/sub-recipients may not impose an upper age limit for participation in the SCSEP.

**§ 641.585 What is the employment status of SCSEP participants?**

(a) Participants are not considered Federal employees solely as a result of their participation in the SCSEP. (OAA sec. 504(a)).

(b) Grantees must determine whether or not a participant qualifies as an employee of the grantee, sub-recipient, local project, or host agency, under applicable law. Responsibility for this determination rests with the grantee even when a Federal agency is a grantee or host agency.

## Subpart F—Pilot, Demonstration, and Evaluation Projects

**§ 641.600 What is the purpose of the pilot, demonstration, and evaluation projects authorized under section 502(e) of the OAA?**

The purpose of the pilot, demonstration, and evaluation projects authorized under section 502(e) of the OAA is to develop and implement techniques and approaches, and to demonstrate the effectiveness of these techniques and approaches, in addressing the employment and training needs of individuals eligible for SCSEP.

**§ 641.610 How are pilot, demonstration, and evaluation projects administered?**

The Department may enter into agreements with States, public agencies, nonprofit private organizations, or private business concerns, as may be necessary, to conduct pilot, demonstration, and evaluation projects.

**§ 641.620 How may an organization apply for pilot, demonstration, and evaluation project funding?**

Organizations applying for pilot, demonstration, and evaluation project funding must follow the instructions issued by the Department.

**§ 641.630 What pilot, demonstration, and evaluation project activities are allowable under section 502(e)?**

Allowable pilot, demonstration and evaluation projects include:

(a) Activities linking businesses and eligible individuals, including activities providing assistance to participants transitioning from subsidized activities to private sector employment;

(b) Demonstration projects and pilot projects designed to:

(1) Attract more eligible individuals into the labor force;

(2) Improve the provision of services to eligible individuals under One-Stop Delivery Systems established under title I of WIA;

(3) Enhance the technological skills of eligible individuals; and

(4) Provide incentives to SCSEP grantees for exemplary performance and incentives to businesses to promote their participation in the SCSEP;

(c) Demonstration projects and pilot projects, as described in paragraph (b) of this section, for workers who are older individuals (but targeted to eligible individuals) only if such demonstration projects and pilot projects are designed to assist in developing and implementing techniques and approaches in addressing the employment and training needs of eligible individuals;

(d) Provision of training and technical assistance to support a SCSEP project;

(e) Dissemination of best practices relating to employment of eligible individuals; and

(f) Evaluation of SCSEP activities.

**§ 641.640 Should pilot, demonstration, and evaluation project entities coordinate with SCSEP grantees/sub-recipients, including area agencies on aging?**

(a) To the extent practicable, the Department will provide an opportunity, prior to the development of a demonstration or pilot project, for the appropriate area agency on aging to submit comments on such a project in order to ensure coordination of SCSEP activities with activities carried out under this subpart.

(b) To the extent practicable, entities carrying out pilot, demonstration, and evaluation projects must consult with appropriate area agencies on aging and with other appropriate agencies and entities to promote coordination of SCSEP and pilot, demonstration, and evaluation activities. (OAA sec. 502(e)).

8. Revise subparts H and I of part 641 to read as follows:

**Subpart H—Administrative Requirements**



**Subpart I—Grievance Procedures and Appeals Process**



## Subpart H—Administrative Requirements

**§ 641.800 What uniform administrative requirements apply to the use of SCSEP funds?**

(a) SCSEP recipients and sub-recipients must follow the uniform administrative requirements and allowable cost requirements that apply to their type of organization. (OAA sec. 503(f)(2)).

(b) Governments, State, local, and Indian tribal organizations, that receive SCSEP funds under grants or cooperative agreements must follow the

common rule implementing OMB Circular A–102, ''Grants and Cooperative Agreements with State and Local Governments'' (10/07/1994) (further amended 08/29/1977), codified at 29 CFR part 97.

(c) Nonprofit and commercial organizations, institutions of higher education, hospitals, other nonprofit organizations, and commercial organizations that receive SCSEP funds under grants or cooperative agreements, must follow the common rule implementing OMB Circular A–110, codified at 29 CFR part 95.

**§ 641.803 What is program income?**

Program income, as described in 29 CFR 97.25 (State and local governments) and 29 CFR 95.2(bb) (non-profit and commercial organizations), is income earned by the recipient or sub-recipient during the grant period that is directly generated by an allowable activity supported by grant funds or earned as a result of the award of grant funds. Program income includes income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. (See 29 CFR 95.24(e) (non-profit and commercial organizations) and 29 CFR 97.25(e) (State and local governments)). Costs of generating SCSEP program income may be deducted from gross income received by SCSEP recipients and sub-recipients to determine SCSEP program income earned or generated provided these costs have not been charged to the SCSEP.

**§ 641.806 How must SCSEP program income be used?**

(a) SCSEP recipients that earn or generate program income during the grant period must add the program income to the Federal and non-Federal funds committed to the SCSEP and must use it for the program, during the grant period in which it was earned, as provided in 29 CFR 95.24(a) (non-profit and commercial organizations) or 29 CFR 97.25(g) (2) (State and local governments), as applicable.

(b) Recipients that continue to receive a SCSEP grant from the Department must spend program income earned or generated from SCSEP-funded activities after the end of the grant period for SCSEP purposes in the Program Year it was received.

(c) Recipients that do not continue to receive a SCSEP grant from the Department must remit unexpended program income earned or generated during the grant period from SCSEP funded activities to the Department after the end of the grant period. These recipients have no obligation to the Department for program income earned after the end of the grant period.

**§ 641.809 What non-Federal share (matching) requirements apply to the use of SCSEP funds?**

(a) The Department will pay no more than 90 percent of the total cost of activities carried out under a SCSEP grant. (OAA sec. 502(c)(1)).

(b) All SCSEP recipients, including Federal agencies if there is no statutory exemption, must provide or ensure that at least 10 percent of the total cost of activities carried out under a SCSEP grant (non-Federal share of costs) consists of allowable costs paid for with non-Federal funds, except as provided in paragraphs (e) and (f) of this section.

(c) Recipients must determine the non-Federal share of costs in accordance with 29 CFR 97.24 for governmental units, or 29 CFR 95.23 for nonprofit and commercial organizations.

(d) The non-Federal share of costs may be provided in cash, or in-kind, or a combination of the two. (OAA sec. 502(c)(2)).

(e) A recipient may not require a sub-recipient or host agency to provide non-Federal resources for the use of the SCSEP project as a condition of entering into a sub-recipient or host relationship. This does not preclude a sub-recipient or host agency from voluntarily contributing non-Federal resources for the use of the SCSEP project.

(f) The Department may pay all of the costs of activities in an emergency or disaster project or a project in an economically distressed area. (OAA sec. 502(c)(1)).

**§ 641.812 What is the period of availability of SCSEP funds?**

(a) Except as provided in § 641.815, recipients must expend SCSEP funds during the Program Year for which they are awarded (July 1–June 30). (OAA sec. 515(b)).

(b) SCSEP recipients must ensure that no sub-agreement provides for the expenditure of any SCSEP funds before July 1 of the grant year, or after the end of the grant period, except as provided in § 641.815.

**§ 641.815 May the period of availability be extended?**

SCSEP recipients may request in writing, and the Department may grant, an extension of the period during which SCSEP funds may be obligated or expended. SCSEP recipients requesting an extension must justify that an extension is necessary. (OAA sec. 515(b)). The Department will notify recipients in writing of the approval or disapproval of any such requests.

**§ 641.821 What audit requirements apply to the use of SCSEP funds?**

(a) Recipients and sub-recipients receiving Federal awards of SCSEP funds must follow the audit requirements in paragraphs (b) and (c) of this section that apply to their type of organization. As used here, Federal awards of SCSEP funds include Federal financial assistance and Federal cost-reimbursement contracts received directly from the Department or indirectly under awards by SCSEP recipients or higher-tier sub-recipients. (OAA sec. 503(f)(2)).

(b) All governmental and nonprofit organizations that are recipients or sub-recipients must follow the audit requirements of OMB Circular A–133. These requirements are codified at 29 CFR parts 96 and 99 and referenced in 29 CFR 97.26 for governmental organizations; and in 29 CFR 95.26 for institutions of higher education, hospitals, and other nonprofit organizations.

(c)(1) The Department is responsible for audits of SCSEP recipients that are commercial organizations.

(2) Commercial organizations that are sub-recipients under the SCSEP and that expend more than the minimum level specified in OMB Circular A–133 ($500,000, for fiscal years ending after December 31, 2003) must have either an organization-wide audit or a program-specific financial and compliance audit conducted in accordance with OMB Circular A–133.

**§ 641.824 What lobbying requirements apply to the use of SCSEP funds?**

SCSEP recipients and sub-recipients must comply with the restrictions on lobbying codified in the Department's regulations at 29 CFR part 93. (Also refer to § 641.850(c), ''Lobbying costs.'')

**§ 641.827 What general nondiscrimination requirements apply to the use of SCSEP funds?**

(a) SCSEP recipients, sub-recipients, and host agencies are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR parts 31 and 32 and the provisions regarding the equal treatment of religious organizations at 29 CFR part 2 subpart D.

(b) Recipients and sub-recipients of SCSEP funds are required to comply with the nondiscrimination provisions codified in the Department's regulations at 29 CFR part 37 if:

(1) The recipient:

(i) Is a One-Stop partner listed in section 121(b) of WIA, and

(ii) Operates programs and activities that are part of the One-Stop Delivery System established under WIA; or

(2) The recipient otherwise satisfies the definition of ''recipient'' in 29 CFR 37.4.

(c) Recipients must ensure that participants are provided informational materials relating to age discrimination and/or their rights under the Age Discrimination in Employment Act of 1975 that are distributed to recipients by the Department pursuant to section 503(b)(3) of the OAA.

(d) Questions about, or complaints alleging a violation of, the nondiscrimination requirements cited in this section may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N–4123, 200 Constitution Avenue, NW., Washington, DC 20210, for processing. (See § 641.910(d)).

(e) The specification of any right or protection against discrimination in paragraphs (a) through (d) of this section must not be interpreted to exclude or diminish any other right or protection against discrimination in connection with a SCSEP project that may be available to any participant, applicant for participation, or other individual under any applicable Federal, State, or local laws prohibiting discrimination, or their implementing regulations.

**§ 641.833 What policies govern political patronage?**

(a) A recipient or sub-recipient must not select, reject, promote, or terminate an individual based on political services provided by the individual or on the individual's political affiliations or beliefs. In addition, as indicated in § 641.827(b), certain recipients and sub-recipients of SCSEP funds are required to comply with WIA nondiscrimination regulations in 29 CFR part 37. These regulations prohibit discrimination on the basis of political affiliation or belief.

(b) A recipient or sub-recipient must not provide funds to any sub-recipient, host agency, or other entity based on political affiliation.

(c) SCSEP recipients must ensure that every entity that receives SCSEP funds through the recipient is applying the policies stated in paragraphs (a) and (b) of this section.

**§ 641.836 What policies govern political activities?**

(a) No project under title V of the OAA may involve political activities. SCSEP recipients must ensure compliance with the requirements and prohibitions involving political activities described in paragraphs (b) and (c) of this section.

(b) State and local employees involved in the administration of SCSEP activities may not engage in political activities prohibited under the Hatch Act (5 U.S.C. chapter 15), including:

(1) Seeking partisan elective office;

(2) Using official authority or influence for the purpose of affecting elections, nominations for office, or fund-raising for political purposes. (5 U.S.C. 1502).

(c) SCSEP recipients must provide all persons associated with SCSEP activities with a written explanation of allowable and unallowable political activities under the Hatch Act. A notice explaining these allowable and unallowable political activities must be posted in every workplace in which SCSEP activities are conducted. The Department will provide the form and content of the notice and explanatory material by administrative issuance. (OAA sec. 502(b)(l)(P)).

(d) SCSEP recipients must ensure that:

(1) No SCSEP participants or staff persons engage in partisan or nonpartisan political activities during hours for which they are being paid with SCSEP funds.

(2) No participants or staff persons engage in partisan political activities in which such participants or staff persons represent themselves as spokespersons for the SCSEP.

(3) No participants are employed or out-stationed in the offices of a Member of Congress, a State or local legislator, or on the staff of any legislative committee.

(4) No participants are employed or out-stationed in the immediate offices of any elected chief executive officer of a State or unit of general government, except that:

(i) Units of local government may serve as host agencies for participants, provided that their assignments are non-political; and

(ii) While assignments may technically place participants in such offices, such assignments actually must be concerned with program and service activities and not in any way involved in political functions.

(5) No participants are assigned to perform political activities in the offices of other elected officials. Placement of participants in such offices in non-political assignments is permissible, however, provided that:

(i) SCSEP recipients develop safeguards to ensure that participants placed in these assignments are not involved in political activities; and

(ii) These safeguards are described in the grant agreement and are subject to review and monitoring by the SCSEP recipient and by the Department.

**§ 641.839 What policies govern union organizing activities?**

Recipients must ensure that SCSEP funds are not used in any way to assist, promote, or deter union organizing.

**§ 641.841 What policies govern nepotism?**

(a) SCSEP recipients must ensure that no recipient or sub-recipient hires, and no host agency serves as a worksite for, a person who works in a SCSEP community service employment assignment if a member of that person's immediate family is engaged in a decision-making capacity (whether compensated or not) for that project, subproject, recipient, sub-recipient, or host agency. The Department may exempt worksites on Native American reservations and in rural areas from this requirement provided that adequate justification can be documented, such as that no other persons are eligible and available for participation in the program.

(b) To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, SCSEP recipients must ensure that the more restrictive requirement is followed.

(c) For purposes of this section, ''immediate family'' means wife, husband, son, daughter, mother, father, brother, sister, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild.

**§ 641.844 What maintenance of effort requirements apply to the use of SCSEP funds?**

(a) A community service employment assignment for a participant under title V of the OAA is permissible only when specific maintenance of effort requirements are met.

(b) Each project funded under title V:

(1) Must not reduce the number of employment opportunities or vacancies that would otherwise be available to individuals not participating in the program;

(2) Must not displace currently employed workers (including partial displacement, such as a reduction in the hours of non-overtime work, wages, or employment benefits);

(3) Must not impair existing contracts or result in the substitution of Federal funds for other funds in connection with work that would otherwise be performed; and

(4) Must not employ or continue to employ any eligible individual to perform the same work or substantially the same work as that performed by any other individual who is on layoff. (OAA sec. 502(b)(1)(G)).

**§ 641.847 What uniform allowable cost requirements apply to the use of SCSEP funds?**

(a) General. Unless specified otherwise in this part or the grant agreement, recipients and sub-recipients must follow the uniform allowable cost requirements that apply to their type of organization. For example, a local government sub-recipient receiving SCSEP funds from a nonprofit organization must use the allowable cost requirements for governmental organizations in OMB Circular A–87. The Department's regulations at 29 CFR 95.27 (nonprofit and commercial organizations) and 29 CFR 97.22 (State and local governments) identify the Federal principles for determining allowable costs that each kind of organization must follow. The applicable Federal principles for each kind of organization are described in paragraphs (b)(1) through (b)(5) of this section. (OAA sec. 503(f)(2)).

(b) Allowable costs/cost principles.

(1) Allowable costs for State, local, and Indian tribal government organizations must be determined under OMB Circular A–87, ''Cost Principles for State, Local and Indian Tribal Governments.''

(2) Allowable costs for nonprofit organizations must be determined under OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.''

(3) Allowable costs for institutions of higher education must be determined under OMB Circular A–21, ''Cost Principles for Educational Institutions.''

(4) Allowable costs for hospitals must be determined in accordance with appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(5) Allowable costs for commercial organizations and those nonprofit organizations listed in Attachment C to OMB Circular A–122 must be determined under the provisions of the Federal Acquisition Regulation (FAR), at 48 CFR part 31.

**§ 641.850 Are there other specific allowable and unallowable cost requirements for the SCSEP?**

(a) Yes, in addition to the generally applicable cost principles in § 641.847(b), the cost principles in paragraphs (b) through (g) of this section apply to SCSEP grants.

(b) *Claims against the Government.* For all types of entities, legal expenses for the prosecution of claims against the Federal Government, including appeals to an Administrative Law Judge, are unallowable.

(c) *Lobbying costs.* In addition to the prohibition contained in 29 CFR part 93, SCSEP funds must not be used to pay any salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States or any State legislature. (See § 641.824).

(d) *One-Stop Costs.* Costs of participating as a required partner in the One-Stop Delivery System established in accordance with section 134(c) of the Workforce Investment Act of 1998 are allowable, provided that SCSEP services and funding are provided in accordance with the MOU required by the Workforce Investment Act and section 502(b)(1)(O) of OAA, and costs are determined in accordance with the applicable cost principles. The costs of services provided by the SCSEP, including those provided by participants/enrollees, may comprise a portion or the total of a SCSEP project's proportionate share of One-Stop costs.

(e) *Building repairs and acquisition costs.* Except as provided in this paragraph and as an exception to the allowable cost principles in § 641.847(b), no SCSEP funds may be used for the purchase, construction, or renovation of any building except for the labor involved in:

(1) Minor remodeling of a public building necessary to make it suitable for use for project purposes;

(2) Minor repair and rehabilitation of publicly used facilities for the general benefit of the community; and

(3) Minor repair and rehabilitation by participants of housing occupied by persons with low incomes who are declared eligible for such services by authorized local agencies.

(f) *Accessibility and reasonable accommodation.* Recipients and sub-recipients may use SCSEP funds to meet their obligations under section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, and any other applicable Federal disability nondiscrimination laws, to provide physical and programmatic accessibility and reasonable accommodation/modifications for, and effective communications with, individuals with disabilities. (29 U.S.C. 794).

(g) *Participants' benefit costs.* Recipients and sub-recipients may use SCSEP funds for participant benefit costs only under the conditions set forth in § 641.565.

**§ 641.853 How are costs classified?**

(a) All costs must be classified as ''administrative costs'' or ''programmatic activity costs.'' (OAA sec. 502(c)(6)).

(b) Recipients and sub-recipients must assign participants' wage and benefit costs and other participant (enrollee) costs such as supportive services to the programmatic activity cost category. (See § 641.864). When a participant's community service employment assignment involves functions whose costs are normally classified as administrative costs, compensation provided to the participants must be charged as programmatic activity costs instead of administrative costs, since participant wage and benefit costs are always charged to the programmatic activity cost category.

**§ 641.856 What functions and activities constitute administrative costs?**

(a) Administrative costs are that allocable portion of necessary and reasonable allowable costs of recipients and program operators that are associated with those specific functions identified in paragraph (b) of this section and that are not related to the direct provision of programmatic activities specified in § 641.864. These costs may be both personnel and non-personnel and both direct and indirect costs.

(b) Administrative costs are the costs associated with:

(1) Performing general administrative and coordination functions, including:

(i) Accounting, budgeting, financial, and cash management functions;

(ii) Procurement and purchasing functions;

(iii) Property management functions;

(iv) Personnel management functions;

(v) Payroll functions;

(vi) Coordinating the resolution of findings arising from audits, reviews, investigations, and incident reports;

(vii) Audit functions;

(viii) General legal services functions;

(ix) Developing systems and procedures, including information systems, required for these administrative functions;

(x) Preparing administrative reports; and

(xi) Other activities necessary for general administration of government funds and associated programs.

(2) Oversight and monitoring responsibilities related to administrative functions;

(3) Costs of goods and services used for administrative functions of the program, including goods and services such as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(4) Travel costs incurred for official business in carrying out administrative activities or the overall management of the program;

(5) Costs of information systems related to administrative functions (for example, personnel, procurement, purchasing, property management, accounting, and payroll systems) including the purchase, systems development, and operating costs of such systems; and

(6) Costs of technical assistance, professional organization membership dues, and evaluating results obtained by the project involved against stated objectives. (OAA sec. 502(c)(4)).

**§ 641.859 What other special rules govern the classification of costs as administrative costs or programmatic activity costs?**

(a) Recipients and sub-recipients must comply with the special rules for classifying costs as administrative costs or programmatic activity costs set forth in paragraphs (b) through (e) of this section.

(b)(1) Costs of awards by recipients and program operators that are solely for the performance of their own administrative functions are classified as administrative costs.

(2) Costs incurred by recipients and program operators for administrative functions listed in § 641.856(b) are classified as administrative costs.

(3) Costs incurred by vendors and sub-recipients performing the administrative functions of recipients and program operators are classified as administrative costs. (See 29 CFR 99.210 for a discussion of factors differentiating sub-recipients from vendors.)

(4) Except as provided in paragraph (b)(3) of this section, all costs incurred by all vendors, and only those sub-recipients below program operators, are classified as programmatic activity costs. (See 29 CFR 99.210 for a discussion of factors differentiating sub-recipients from vendors.)

(c) Personnel and related non-personnel costs of staff who perform both administrative functions specified in § 641.856(b) and programmatic services or activities must be allocated as administrative or programmatic activity costs to the benefiting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.

(d) The allocable share of indirect or overhead costs charged to the SCSEP grant are to be allocated to the administrative and programmatic activity cost categories in the same proportion as the costs in the overhead or indirect cost pool are classified as programmatic activity or administrative costs.

(e) Costs of the following information systems including the purchase, systems development and operating (*e.g.*, data entry) costs are charged to the programmatic activity cost category:

(1) Tracking or monitoring of participant and performance information;

(2) Employment statistics information, including job listing information, job skills information, and demand occupation information; and

(3) Local area performance information.

**§ 641.861 Must SCSEP recipients provide funding for the administrative costs of sub-recipients?**

(a) Recipients and sub-recipients must obtain funding for administrative costs to the extent practicable from non-Federal sources. (OAA sec. 502(c)(5)).

(b) SCSEP recipients must ensure that sufficient funding is provided for the administrative activities of sub-recipients that receive SCSEP funding through the recipient. Each SCSEP recipient must describe in its grant application the methodology used to ensure that sub-recipients receive sufficient funding for their administrative activities. (OAA sec. 502(b)(1)(R)).

**§ 641.864 What functions and activities constitute programmatic activity costs?**

Programmatic activity costs include, but are not limited to, the costs of the following functions:

(a) Participant wages, such benefits as are required by law (such as workers' compensation or unemployment compensation), the costs of physical examinations, compensation for scheduled work hours during which a host agency is closed for a Federal holiday, and necessary sick leave that is not part of an accumulated sick leave program, except that no amounts provided under the grant may be used to pay the cost of pension benefits, annual leave, accumulated sick leave, or bonuses, as described in § 641.565;

(b) Outreach, recruitment and selection, intake, orientation, assessment, and preparation and updating of IEPs;

(c) Participant training, as described in § 641.540, which may be provided prior to commencing or concurrent with a community service employment assignment, and which may be provided at a host agency, in a classroom setting, or utilizing other appropriate arrangements, which may include reasonable costs of instructors' salaries, classroom space, training supplies, materials, equipment, and tuition;

(d) Subject to the restrictions in § 641.535(c), job placement assistance, including job development and job search assistance, job fairs, job clubs, and job referrals; and

(e) Participant supportive services, to enable an individual to successfully participate in a SCSEP project, as described in § 641.545. (OAA sec. 502(c)(6)(A)).

**§ 641.867 What are the limitations on the amount of SCSEP administrative costs?**

(a) Except as provided in paragraph (b), no more than 13.5 percent of the SCSEP funds received for a Program Year may be used for administrative costs.

(b) The Department may increase the amount available for administrative costs to not more than 15 percent, in accordance with § 641.870. (OAA sec. 502(c)(3)).

**§ 641.870 Under what circumstances may the administrative cost limitation be increased?**

(a) SCSEP recipients may request that the Department increase the amount available for administrative costs. The Department may honor the request if:

(1) The Department determines that it is necessary to carry out the project; and

(2) The recipient demonstrates that:

(i) Major administrative cost increases are being incurred in necessary program components, including liability insurance, payments for workers' compensation for staff, costs associated with achieving unsubsidized placement goals, and other operation requirements imposed by the Department;

(ii) The number of community service employment assignment positions in the project or the number of minority eligible individuals participating in the project will decline if the amount available for paying the cost of administration is not increased; or

(iii) The size of the project is so small that the amount of administrative costs incurred to carry out the project necessarily exceeds 13.5 percent of the grant amount. (OAA sec. 502(c)(3)).

(b) A request by a recipient or prospective recipient for an increase in the amount available for administrative costs may be submitted as part of the grant application or as a separate submission at any time after the grant award.

**§ 641.873 What minimum expenditure levels are required for participant wages and benefits?**

(a) Except as provided in § 641.874, not less than 75 percent of the SCSEP funds provided under a grant from the Department must be used to pay for wages and benefits of participants as described in § 641.864(a). (OAA sec. 502(c)(6)(B)).

(b) A SCSEP recipient is in compliance with this provision if at least 75 percent of the total award amount of SCSEP funds provided to the recipient was spent for wages and benefits, even if one or more sub-recipients did not expend at least 75 percent of their SCSEP sub-recipient award for wages and benefits.

(c) A SCSEP grantee may submit to the Department a request for approval to use not less than 65 percent of the grant funds to pay wages and benefits pursuant to § 641.874.

**§ 641.874 What conditions apply to a SCSEP grantee request to use additional funds for training and supportive service costs?**

(a) A grantee may submit to the Department a request for approval—

(1) To use not less than 65 percent of the grant funds to pay the wages and benefits described in § 641.864(a);

(2) To use the percentage of grant funds specified in § 641.867 to pay for administrative costs as described in § 641.856;

(3) To use the 10 percent of grant funds that would otherwise be devoted to wages and benefits under § 641.873 to provide participant training (as described in § 641.540(e)) and participant supportive services to enable a participant to successfully participate in a SCSEP project (as described in § 641.545), in which case the grantee must provide (from the funds described in this paragraph) the subsistence allowance described in § 641.565(a) for those individual participants who are receiving training from the funds described in this paragraph, but may not use the funds described in this paragraph to pay for any administrative costs; and

(4) To use the remaining grant funds to provide participant training, job placement assistance, participant supportive services, and outreach, recruitment and selection, intake, orientation and assessment.

(b) In submitting the request the grantee must include in the request—

(1) A description of the activities for which the grantee will spend the grant funds described in paragraphs (a)(3) and (a)(4) of this section;

(2) An explanation documenting how the provision of such activities will improve the effectiveness of the project, including an explanation concerning whether any displacement of eligible individuals or elimination of positions for such individuals will occur, information on the number of such individuals to be displaced and of such positions to be eliminated, and an explanation concerning how the activities will improve employment outcomes for individuals served, based on the assessment conducted pursuant to § 641.535(a)(2); and

(3) A proposed budget and work plan for the activities, including a detailed description of the funds to be spent on the activities described in paragraphs (a)(3) and (a)(4) of this section.

(c)(1) If a grantee wishes to amend an existing grant agreement to use additional funds for training and supportive service costs, the grantee must submit such a request not later than 90 days before the proposed date of implementation contained in the request. Not later than 30 days before the proposed date of implementation, the Department will approve, approve as modified, or reject the request, on the basis of the information included in the request.

(2) If a grantee submits a request to use additional funds for training and supportive service costs in the grant application, the request will be accepted and processed as a part of the grant review process.

(d) Grantees may apply this provision to individual sub-recipients but need not provide this opportunity to all their sub-recipients.

**§ 641.876 When will compliance with cost limitations and minimum expenditure levels be determined?**

The Department will determine compliance by examining expenditures of SCSEP funds. The cost limitations and minimum expenditure level requirements must be met at the time all such funds have been expended or the period of availability of such funds has expired, whichever comes first.

**§ 641.879 What are the financial and performance reporting requirements for recipients?**

(a) In accordance with 29 CFR 97.41 (State and local governments) or 29 CFR 95.52 (non-profit and commercial organizations), each SCSEP recipient must submit a SCSEP Financial Status Report (FSR, ETA Form 9130) in electronic format to the Department via the Internet within 45 days after the ending of each quarter of the Program Year. Each SCSEP recipient must also submit a final closeout FSR to the Department via the Internet within 90 days after the end of the grant period. The Department will provide instructions for the preparation of this report. (OAA sec. 503(f)(3)).

(1) Financial data must be reported on an accrual basis, and cumulatively by funding year of appropriation. Financial data may also be required on specific program activities.

(2) If the SCSEP recipient's accounting records are not normally kept on the accrual basis of accounting, the SCSEP recipient must develop accrual information through an analysis of the documentation on hand.

(b) In accordance with 29 CFR 97.40 (State and local governments) or 29 CFR 95.51 (non-profit and commercial organizations), each SCSEP recipient must submit updated data on participants, host agencies, and employers in electronic format via the Internet within 30 days after the end of each of the first three quarters of the Program Year, on the last day of the fourth quarter of the Program Year, and within 90 days after the last day of the Program Year. Recipients wishing to correct data errors or omissions for their final Program Year report must do so within 90 days after the end of the Program Year. The Department will generate SCSEP Quarterly Progress Reports (QPRs), as well as the final QPR, as soon as possible after receipt of the data. (OAA sec. 503(f)(3)).

(c) Each State agency receiving title V funds must annually submit an equitable distribution report of SCSEP positions by all recipients in the State. The Department will provide instructions for the preparation of this report. (OAA sec. 508).

(d) Each SCSEP recipient must collect data and submit reports regarding the performance measures. See Subpart F. The Department will provide instructions detailing these measures and how recipients must prepare this report.

(e) Each SCSEP recipient may be required to collect data and submit reports about the demographic characteristics of program participants. The Department will provide instructions detailing these measures and how recipients must prepare these reports.

(f) Federal agencies that receive and use SCSEP funds under interagency agreements must submit project financial and progress reports in accordance with this section. Federal recipients must maintain the necessary records that support required reports according to instructions provided by the Department. (OAA sec. 503(f)(3)).

(g) Recipients may be required to maintain records that contain any other information that the Department determines to be appropriate in support of any other reports that the Department may require. (OAA sec. 503(f)(3)).

(h) Grantees submitting reports that cannot be validated or verified as accurately counting and reporting activities in accordance with the reporting instructions may be treated as

failing to submit reports, which may result in failing one of the responsibility tests outlined in § 641.430 and section 514(d) of the OAA.

**§ 641.881 What are the SCSEP recipient's responsibilities relating to awards to sub-recipients?**

(a) Recipients are responsible for ensuring that all awards to sub-recipients are conducted in a manner to provide, to the maximum extent practicable, full and open competition in accordance with the procurement procedures in 29 CFR 95.43 (non-profit and commercial organizations) and 29 CFR 97.36 (State and local governments).

(b) The SCSEP recipient is responsible for all grant activities, including the performance of SCSEP activities by sub-recipients, and ensuring that sub-recipients comply with the OAA and this part. (See also OAA sec. 514 and § 641.430 of this part on responsibility tests).

(c) Recipients must follow their own procedures for allocating funds to other entities. The Department will not grant funds to another entity on the recipient's behalf.

(d)(1) National grantees that receive grants to provide services in an area where a substantial population of individuals with barriers to employment exists must, in selecting sub-recipients, give special consideration to organizations (including former national grant recipients) with demonstrated expertise in serving such individuals. (OAA sec. 514(e)(2)).

(2) For purposes of this section, the term ''individuals with barriers to employment'' means minority individuals, Indian individuals, individuals with greatest economic need, and most-in-need individuals. (OAA sec. 514(e)(1)).

**§ 641.884 What are the grant closeout procedures?**

SCSEP recipients must follow the grant closeout procedures at 29 CFR 97.50 (State and local governments) or 29 CFR 95.71 (non-profit and government organizations), as appropriate. The Department will issue supplementary closeout instructions to title V recipients as necessary.XXX

## Subpart I—Grievance Procedures and Appeals Process

**§ 641.900 What appeal process is available to an applicant that does not receive a grant?**

(a) An applicant for financial assistance under title V of the OAA that is dissatisfied because the Department has issued a notification that it has not awarded financial assistance, in whole or in part, to such applicant, may request that the Grant Officer provide an explanation for not awarding financial assistance to that applicant. The request must be filed within 10 days of the date of notification indicating that financial assistance would not be awarded. The Grant Officer must provide the protesting applicant with feedback concerning its proposal within 21 days of the protest. Applicants may appeal to the U.S. Department of Labor, Office of Administrative Law Judges (OALJ), within 21 days of the date of the Grant Officer's feedback on the proposal, or within 21 days of the Grant Officer's notification that financial assistance would not be awarded if the applicant does not request feedback on his proposal. The appeal may be for a part or the whole of a denial of funding. This appeal will not in any way interfere with the Department's decisions to fund other organizations to provide services during the appeal period.

(b) Failure to file an appeal within the 21 days provided in paragraph (a) of this section constitutes a waiver of the right to a hearing.

(c) A request for a hearing under this section must state specifically those issues in the Grant Officer's notification upon which review is requested. Those provisions of the Grant Officer's notification not specified for review, or the entire notification when no hearing has been requested within 21 days, are considered resolved and not subject to further review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400 North, 800 K Street, NW., Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2–96, published at 61 FR 19978, May 3, 1996), specifically identifying the procedure, fact, law, or policy to which exception is taken. The Department will deem any exception not specifically urged to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ constitutes final agency action unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

(f) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, set forth at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(1) The appeal is not considered as a complaint; and

(2) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the ALJ conducting the hearing considers them reasonably necessary. The certified copy of the administrative file transmitted to the ALJ by the official issuing the notification not to award financial assistance must be part of the evidentiary record of the case and need not be moved into evidence.

(g) The ALJ should render a written decision no later than 90 days after the closing of the record.

(h) The remedies available are provided in § 641.470.

(i) This section only applies to multi-year grant awards.

**§ 641.910 What grievance procedures must grantees make available to applicants, employees, and participants?**

(a) Each grantee must establish, and describe in the grant agreement, grievance procedures for resolving complaints, other than those described by paragraph (d) of this section, arising between the grantee, employees of the grantee, sub-recipients, and applicants or participants.

(b) The Department will not review final determinations made under paragraph (a) of this section, except to determine whether the grantee's grievance procedures were followed, and according to paragraph (c) of this section.

(c) Allegations of violations of Federal law, other than those described in paragraph (d) of this section, which are not resolved within 60 days under the grantee's procedures, may be filed with the Chief, Division of Adult Services, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Allegations determined to be substantial and credible will be investigated and addressed.

(d) Questions about, or complaints alleging a violation of, the nondiscrimination requirements of title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, section 188 of the Workforce Investment Act of 1998 (WIA), or their implementing regulations, may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N–4123, 200 Constitution Avenue, NW., Washington, DC 20210. In the alternative, complaints alleging violations of WIA section 188 may be filed initially at the grantee level. See 29 CFR 37.71, 37.76. In such cases, the grantee must use complaint processing procedures meeting the requirements of 29 CFR 37.70 through 37.80 to resolve the complaint.

**§ 641.920 What actions of the Department may a grantee appeal and what procedures apply to those appeals?**

(a) Appeals from a final disallowance of costs as a result of an audit must be made under 29 CFR 96.63.

(b) Appeals of suspension or termination actions taken on the grounds of discrimination are processed under 29 CFR 31 or 29 CFR 37, as appropriate.

(c) Protests and appeals of decisions not to award a grant, in whole or in part, will be handled under § 641.900.

(d) Upon a grantee's receipt of the Department's final determination relating to costs (except final disallowance of costs as a result of an audit, as described in paragraph (a) of this section), payment, suspension or termination, or the imposition of sanctions, the grantee may appeal the final determination to the Department's Office of Administrative Law Judges, as follows:

(1) Within 21 days of receipt of the Department's final determination, the grantee may transmit by certified mail, return receipt requested, a request for a hearing to the Chief Administrative Law Judge, United States Department of Labor, Suite 400 North, 800 K Street, NW., Washington, DC 20001 with a copy to the Department official who signed the final determination.

(2) The request for hearing must be accompanied by a copy of the final determination, and must state specifically those issues of the determination upon which review is requested. Those provisions of the determination not specified for review, or the entire determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review.

(3) The Rules of Practice and Procedures for Administrative Hearings Before the Office of Administrative Law Judges, set forth at 29 CFR part 18, govern the conduct of hearings under this section, except that:

(i) The appeal is not considered as a complaint; and

(ii) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of 29 CFR part 18, will not apply to any hearing conducted under this section. However, rules designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied when the Administrative Law Judge conducting the hearing considers them reasonably necessary. The certified copy of the administrative file transmitted to the Administrative Law Judge by the official issuing the final determination must be part of the evidentiary record of the case and need not be moved into evidence.

(4) The Administrative Law Judge should render a written decision no later than 90 days after the closing of the record. In ordering relief, the ALJ may exercise the full authority of the Secretary under the OAA.

(5) The decision of the ALJ constitutes final agency action unless, within 21 days of the decision, a party dissatisfied with the ALJ's decision, in whole or in part, has filed a petition for review with the ARB (established under Secretary's Order No. 2–96), specifically identifying the procedure, fact, law, or policy to which exception is taken. The Department will deem any exception not specifically urged to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ constitutes final agency action unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

**§ 641.930 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?**

(a) Parties to a complaint that has been filed according to the requirements of § 641.920 (a), (c), and (d) may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) Unless the parties agree in writing to extend the period, the waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as the final agency decision.

Signed at Washington, DC, this 30th day of July 2008.

**Brent R. Orrell,**

*Deputy Assistant Secretary, Employment and Training Administration.*

[FR Doc. E8–17802 Filed 8–13–08; 8:45 am]

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## LIST OF PUBLIC LAWS

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**H.R. 2245/P.L. 110–302**

To designate the Department of Veterans Affairs outpatient clinic in Wenatchee, Washington, as the Elwood ''Bud'' Link Department of Veterans Affairs Outpatient Clinic. (Aug. 12, 2008; 122 Stat. 3003)

**H.R. 4210/P.L. 110–303**

To designate the facility of the United States Postal Service located at 401 Washington Avenue in Weldon, North Carolina, as the ''Dock M. Brown Post Office Building''. (Aug. 12, 2008; 122 Stat. 3004)

**H.R. 4918/P.L. 110–304**

To name the Department of Veterans Affairs medical center in Miami, Florida, as the ''Bruce W. Carter Department of Veterans Affairs Medical Center''. (Aug. 12, 2008; 122 Stat. 3005)

**H.R. 5477/P.L. 110–305**

To designate the facility of the United States Postal Service located at 120 South Del Mar Avenue in San Gabriel, California, as the ''Chi Mui Post Office Building''. (Aug. 12, 2008; 122 Stat. 3006)

**H.R. 5483/P.L. 110–306**

To designate the facility of the United States Postal Service located at 10449 White Granite Drive in Oakton, Virginia, as the ''Private First Class David H. Sharrett II Post Office Building''. (Aug. 12, 2008; 122 Stat. 3007)

**H.R. 5631/P.L. 110–307**

To designate the facility of the United States Postal Service located at 1155 Seminole Trail in Charlottesville, Virginia, as the ''Corporal Bradley T. Arms Post Office Building''. (Aug. 12, 2008; 122 Stat. 3008)

**H.R. 6061/P.L. 110–308**

To designate the facility of the United States Postal Service located at 219 East Main Street in West Frankfort, Illinois, as the ''Kenneth James Gray Post Office Building''. (Aug. 12, 2008; 122 Stat. 3009)

**H.R. 6085/P.L. 110–309**

To designate the facility of the United States Postal Service located at 42222 Rancho Las Palmas Drive in Rancho Mirage, California, as the ''Gerald R. Ford Post Office Building''. (Aug. 12, 2008; 122 Stat. 3010)

**H.R. 6150/P.L. 110–310**

To designate the facility of the United States Postal Service located at 14500 Lorain Avenue in Cleveland, Ohio, as the ''John P. Gallagher Post Office Building''. (Aug. 12, 2008; 122 Stat. 3011)

**H.R. 6340/P.L. 110–311**

To designate the Federal building and United States courthouse located at 300 Quarropas Street in White Plains, New York, as the ''Charles L. Brieant, Jr.,

Federal Building and United States Courthouse''. (Aug. 12, 2008; 122 Stat. 3012)

**S. 3294/P.L. 110–312**

United States Parole Commission Extension Act of 2008 (Aug. 12, 2008; 122 Stat. 3013)

**S. 3295/P.L. 110–313**

To amend title 35, United States Code, and the Trademark Act of 1946 to provide that the Secretary of Commerce, in consultation with the Director of the United States Patent and Trademark Office, shall appoint administrative patent judges and administrative trademark judges, and for other purposes. (Aug. 12, 2008; 122 Stat. 3014)

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